49 Am. Jur. 2d Landlord and Tenant Summary

American Jurisprudence, Second Edition | May 2021 Update

Landlord and Tenant
Barbara J. Van Arsdale, J.D.; George L. Blum, J.D.; Noah J. Gordon, J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Eric C. Surette, J.D.

Correlation Table

Summary

Scope:
This article discusses the principles and rules of law applicable to and governing the relation of landlord and tenant. In general, it embraces the creation and existence of the relation through a formal lease, or otherwise, and the rights, duties, and liabilities arising out of the relationship, including the rights and liabilities of third persons such as assignees of the leasehold, subtenants, and transferees of the landlord's reversion. The article also discusses ground rents and permanent leaseholds.

Treated Elsewhere:
Airport or airport property, lease or sublease of, see Am. Jur. 2d, Aviation § 98

Aliens and citizens, leases involving, see Am. Jur. 2d, Aliens and Citizens §§ 2069, 2070

Bona fide purchasers, possession of property by tenant as notice, see Am. Jur. 2d, Vendor and Purchaser § 394

Cloud on title, lease as, see Am. Jur. 2d, Quieting Title and Determination of Adverse Claims § 14

Community property, leases in, see Am. Jur. 2d, Community Property § 86

Cooperative apartments, generally, see Am. Jur. 2d, Condominiums and Co-operative Apartments §§ 1 et seq.

Corporate property, lease of, see Am. Jur. 2d, Corporations §§ 1779, 1780

Criminal attack, duty of landlord to protect tenant from, see Am. Jur. 2d, Negligence §§ 98, 109

Crops on leased premises, ownership of, see Am. Jur. 2d, Crops §§ 23 to 29

Declaratory judgments pertaining to leases, see Am. Jur. 2d, Declaratory Judgments §§ 155 to 164

Deeds distinguished from leases, see Am. Jur. 2d, Deeds § 4

Easement, acquisition by prescription in demised premises, see Am. Jur. 2d, Easements and Licenses in Real Property §§ 35 to 53

Ejectment by landlord or tenant, see Am. Jur. 2d, Ejectment §§ 2, 13, 23, 24

Elevators, liability of landlord or tenant for injuries sustained in use of elevator on leased premises, see Am. Jur. 2d, Elevators and Escalators §§ 20 to 22, 29, 30

Eminent domain, taking of leased property in, see Am. Jur. 2d, Eminent Domain §§ 94, 138, 184 to 191, 212, 257, 264, 318 to 321

Estates in land less than freehold, see Am. Jur. 2d, Estates §§ 130 to 132

Executors and administrators, leases involving, see Am. Jur. 2d, Executors and Administrators § 513

Fixtures, right to as between landlord and tenant, see Am. Jur. 2d, Fixtures §§ 18, 31, 32, 106, 112

Forcible entry and detainer actions, availability of to evict tenant, see Am. Jur. 2d, Forcible Entry and Detainer § 10

Foreign corporations, lease of realty, see Am. Jur. 2d, Foreign Corporations § 310

Garages, leases of, see Am. Jur. 2d, Garages, Service Stations, and Parking Facilities §§ 120 to 127

Gas and oil, leases of, see Am. Jur. 2d, Gas and Oil §§ 59 to 100

Guardians and wards, leases involving, see Am. Jur. 2d, Guardian and Ward §§ 124, 125

Highways, streets, or sidewalks adjacent to the leased premises, responsibility as between landlord and tenant for injury to persons on, see Am. Jur. 2d, Highways, Streets, and Bridges §§ 406, 510, 515, 516, 538, 539, 559, 568

Infants, leases involving, see Am. Jur. 2d, Infants §§ 48, 67, 94

Injuries on leased premises, liability of landlord and tenant, see Am. Jur. 2d, Premises Liability §§ 1 et seq.

Insurable interest in leased property, landlord as having, see Am. Jur. 2d, Insurance § 954

Personal property, leases of under Article 2A of Uniform Commercial Code, see Am. Jur. 2d, Bailments §§ 269 to 339

Public housing, selection of tenants for, see Am. Jur. 2d, Housing Laws and Urban Redevelopment §§ 32, 33

Real estate time-sharing, lease interest, see Am. Jur. 2d, NTS Real Estate Time-Sharing §§ 2, 6

Recording of lease, see Am. Jur. 2d, Records and Recording Laws § 52

Restrictive covenants, by and against whom enforceable, see Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 148 to 284

Rule against perpetuities, lease as subject to, see Am. Jur. 2d, Perpetuities and Restraints on Alienation § 48

Statute of frauds, lease agreement as subject to, see Am. Jur. 2d, Statute of Frauds §§ 82 to 87

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I. Landlord-Tenant Relationship

A. In General

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Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501 to 503, 592, 620, 621

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Landlord and Tenant

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I. Landlord-Tenant Relationship

A. In General

§ 1. Nature of landlord and tenant relationship

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501, 502, 592, 620, 621

The relation of landlord and tenant generally arises from an agreement, or lease, which may be either express or implied,[1] pursuant to which one person—the tenant or lessee—enters into possession and occupancy of the premises of another—the landlord or lessor—for a consideration, usually the payment of rent.[2] The relationship of landlord and tenant may also come into existence by operation of law although no enforceable agreement has ever been entered into by the parties.[3] A landlord-tenant relationship is created when there is (1) a reversion in the landlord, (2) creation of an estate in the tenant either at will or for a term less than that which the landlord holds, (3) transfer of exclusive possession and control to the tenant, and (4) a contract.[4] The relation of landlord and tenant is always created by contract, express or implied, and will not be implied where the acts and conduct of the parties negative its existence.[5]

The rights of a lessee and a lessor in the property subject to a lease are divided;[6] the lessee has the possessory interest, and the lessor has the reversionary interest.[7] Thus, a lessee has a present possessory interest in the premises, while the lessor has a future reversionary interest and retains fee title.[8]

An occupant of a rental unit who does not have the right to exclusive possession and the concomitant obligation to pay rent does not meet the generally accepted common-law definition of a "tenant."[9]

The terms "lessor and lessee" and the terms "landlord and tenant" generally are used almost interchangeably.[10] However, there is authority for the view that a distinction may be drawn between the "lessor-lessee" relationship and the "landlord-tenant" relationship, the former referring only to the contract and the latter referring both to the contract and to the change in possession of the premises.[11]

The relation of landlord and tenant generally is not a fiduciary one;[12] nevertheless, peculiar and unusual facts, circumstances, or provisions in the lease may impose such duties and obligations as to constitute the relationship a fiduciary one.[13]

The essential difference between a "lodger" and a "tenant" is that the former has only a contractual interest, while the latter

has a property interest.[14]

Footnotes

1 § 18.

2 Worthen v. Rushing, 228 Ark. 445, 307 S.W.2d 890 (1957); Misco Industries, Inc. v. Board of County Com'rs of Sedgwick County, 235 Kan. 958, 685 P.2d 866 (1984); Texas Co. v. Butler, 198 Or. 368, 256 P.2d 259 (1953); Redgrave v. Schmitz, 584 S.W.2d 374 (Tex. Civ. App. San Antonio 1979).
As to the nature of the landlord-tenant relationship under the Uniform Residential Landlord and Tenant Act, generally, see § 2.
As to classes of tenancies, see §§ 110 to 126.

3 Pacific Coast Joint Stock Land Bank of San Francisco v. Jones, 14 Cal. 2d 8, 92 P.2d 390, 123 A.L.R. 695 (1939) (tenancy at will).
As to tenancies at will, generally, see §§ 118 to 124.

4 Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coehn & Co., 154 S.W.3d 432 (Mo. Ct. App. W.D. 2005).

5 Scarborough Manor Owners Corp. v. Robson, 57 Misc. 3d 24, 59 N.Y.S.3d 877 (App. Term 2017).

6 Midcontinent Broadcasting Co. v. Dresser Industries, Inc., 486 F. Supp. 858, 29 U.C.C. Rep. Serv. 444 (D.S.D. 1980).

7 Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984).
The lessee's possessory interest, although an interest in real property, is ultimately a species of personal property. District of Columbia v. 17M Associates, LLC, 98 A.3d 954 (D.C. 2014).

8 California State Teachers' Retirement System v. County of Los Angeles, 216 Cal. App. 4th 41, 156 Cal. Rptr. 3d 545 (2d Dist. 2013).

9 Danger Panda, LLC v. Launiu, 10 Cal. App. 5th 502, 216 Cal. Rptr. 3d 231 (1st Dist. 2017).

10 Viterbo v. Friedlander, 120 U.S. 707, 7 S. Ct. 962, 30 L. Ed. 776 (1887); Texas Co. v. Butler, 198 Or. 368, 256 P.2d 259 (1953).

11 Matter of Daben Corp., 469 F. Supp. 135 (D.P.R. 1979); Simon v. Kirkpatrick, 141 S.C. 251, 139 S.E. 614, 54 A.L.R. 1348 (1927).

12 Cahaba Forests, LLC v. Hay, 927 F. Supp. 2d 1273 (M.D. Ala. 2013) (applying Alabama law); Dugan v. First Nat. Bank in Wichita, 227 Kan. 201, 606 P.2d 1009 (1980); Ring v. Arts Intern., Inc., 7 Misc. 3d 869, 792 N.Y.S.2d 296 (N.Y. City Civ. Ct. 2004).

13 Robinson v. Eagle-Picher Lead Co., 132 Kan. 860, 297 P. 697, 75 A.L.R. 840 (1931); Maguet v. Frantz, 95 W. Va. 727, 124 S.E. 117, 37 A.L.R. 1450 (1924).

14 City of Worcester v. College Hill Properties, LLC, 465 Mass. 134, 987 N.E.2d 1236 (2013).

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I. Landlord-Tenant Relationship

A. In General

§ 2. Effect of statutes on landlord and tenant relationship; Uniform Residential Landlord and Tenant Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 502, 503, 592, 620, 621

A.L.R. Library

Coverage of leases under state consumer protection statutes, 89 A.L.R.4th 854

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 3.1

Parties to a residential lease are presumed to contract with reference to currently existing statutes, and provisions of such statutes will be read into and become part of the contract by implication except when a contrary intention has been manifested and is permitted by the statute.[1]

The Uniform Residential Landlord and Tenant Act constitutes a basic reform of landlord-tenant law, according tenants previously unrecognized rights by recognizing the contractual nature of the landlord-tenant relationship.[2] In the absence of a valid rental agreement to the contrary, the Uniform Residential Landlord and Tenant Act, in jurisdictions which have adopted it, provides the basic terms of the landlord-tenant relationship.[3] The purposes of the Uniform Residential Landlord and Tenant Act are: (1) to simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and

obligations of landlords and tenants; (2) to encourage landlords and tenants to maintain and improve the quality of housing; and (3) to make uniform the law among those states which adopt the Act.[4] The Act allows a court to make a determination of the underlying fairness of the rental agreement when made and to allow for selective enforcement of the contract to bring about an equitable result.[5] While a landlord and tenant may include terms and conditions in a rental agreement which impose obligations not contained in the Uniform Residential Landlord and Tenant Act, terms which are "inconsistent with or prohibited by" the Act may not be included.[6]

The Uniform Act does not apply to transient occupancy in a hotel or motel for lodgings,[7] but it does apply to roomers and boarders.[8] The Act does not apply where residence is incidental to another primary purpose, such as residence in a prison, hospital or nursing home, or college or school dormitory, or where residence is by a landlord's employee.[9] The Act applies to government or public agencies acting as landlords, and it applies to occupancy by a holder of an option to purchase, but not to occupancy by a purchaser under a contract of sale.[10]

The Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, does not apply to the following arrangements: (1) residence at an institution, public or private, if incidental to the provisions of medical, mental health, geriatric, counseling, educational, religious, disability, personal safety, or similar service; (2) residence at an institution, public or private, if incidental to detention; (3) occupancy under a contract of sale of, or an option to purchase, a dwelling unit or the building of which it is a party, if the occupant is the purchaser or optionee or an individual who has succeeded to the interest of the purchaser or optionee; (4) occupancy by a member of a fraternal or social organization in a part of a structure operated for the benefit of the organization; (5) transient occupancy; (6) occupancy by an employee of a landlord when the employee's right to occupancy is conditioned on employment in or about the premises; (7) occupancy by a holder of a proprietary lease in a cooperative; (8) occupancy under a lease covering premises used by the occupant for agricultural purposes; (9) occupancy as a vacation rental; and (10) a lease of real property by its owner to another person that owns a manufactured or mobile home or other structure sited on the real property.[11]

The freedom of a landlord to refuse to enter into the landlord-tenant relationship has been substantially limited by federal and state legislation designed to afford protection against invidious discrimination.[12]

State antieviction statutes, are remedial legislation, and should therefore be liberally construed to protect the rights of tenants, with all doubts resolved in favor of the tenant, but at the same time, the fact that such statutes relax the landlord's common-law rights of ownership militates in favor of strict construction; in interpreting such statutes, therefore, a court must strike a balance between these competing interpretive tenets and, by extension, between landlords' rights and tenants' rights.[13]

A state residential landlord and tenant statute is enacted to provide a comprehensive scheme of landlords and tenants' contractual rights and remedies.[14] A state residential landlord-tenant statute supersedes any common-law rules relating to residential tenants and landlords in conflict with its provisions,[15] however, some statutes, by their plain language, do not supersede common-law remedies, such as common-law tenant remedies against a landlord.[16]

CUMULATIVE SUPPLEMENT

Cases:

City's determination, when amending city code to provide temporary tenant protections due to COVID-19 pandemic, to begin relief five days before date on which governor had issued proclamation of disaster emergency did not indicate that amendments lacked rational relationship to city's legitimate interest in preventing spread of COVID-19, and, thus, did not support landlord association's claim that amendments violated substantive due process. U.S. Const. Amend. 14; Pa. Const. art. 1, § 1. HAPCO v. City of Philadephia, 482 F. Supp. 3d 337 (E.D. Pa. 2020).

[END OF SUPPLEMENT]

Footnotes

[1] Federico v. Lincoln Military Housing, LLC, 127 F. Supp. 3d 623 (E.D. Va. 2015) (applying Virginia law); New Hampshire Ins. Co. v. Hewins, 6 Kan. App. 2d 259, 627 P.2d 1159 (1981).

[2] McCall v. Fickes, 556 P.2d 535 (Alaska 1976).

[3] §§ 22 to 26.

[4] Unif. Residential Landlord and Tenant Act § 1.102.

[5] Ramirez-Eames v. Hover, 1989-NMSC-038, 108 N.M. 520, 775 P.2d 722 (1989).

[6] Allstate Ins. Co. v. Dorsey, 46 Ohio App. 3d 66, 545 N.E.2d 920 (9th Dist. Summit County 1988).

[7] Unif. Residential Landlord and Tenant Act § 1.202(4).

[8] Comment to Unif. Residential Landlord and Tenant Act § 1.202.

[9] Comment to Unif. Residential Landlord and Tenant Act § 1.202.

[10] Comment to Unif. Residential Landlord and Tenant Act § 1.202.

[11] Revised Uniform Residential Landlord and Tenant Act § 103(c).

[12] Restatement Second, Property: Landlord and Tenant § 3.1.

[13] Cashin v. Bello, 223 N.J. 328, 123 A.3d 1042 (2015).

[14] Federico v. Lincoln Military Housing, LLC, 127 F. Supp. 3d 623 (E.D. Va. 2015) (applying Virginia law).

[15] Aubin v. MAG Realty, LLC, 161 A.3d 1143 (R.I. 2017).

[16] Landis & Landis Const., LLC v. Nation, 171 Wash. App. 157, 286 P.3d 979 (Div. 1 2012).

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I. Landlord-Tenant Relationship

A. In General

§ 3. Necessity and effect of lessor's title

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501, 502, 592, 620, 621

In a lessor-lessee relationship, the lessor relinquishes physical possession of the property to the lessee, while retaining legal title to the property.[1]

While the right to let property is an incident of the title and possession,[2] a lessor may validly lease property to another, despite the fact that the title to the property is in a third person, if the lessor lawfully possesses the property, and in such a case, the lessee may enforce the lease against the lessor.[3] Such a person cannot escape liability as landlord by showing that the person is not the owner of the property.[4]

Where the real owner of property has by acts and conduct induced a prospective lessee to believe that the title to the premises is in a third person, has permitted such lessee to enter into a lease with the third person without disclosing the error, and has observed the lessee making improvements upon the premises in reliance upon the lease and for the purpose of increasing the value of the leasehold, the owner of the property will be estopped from denying to the lessee the rights which the lessee intended to acquire under the lease.[5] A lessor cannot create any greater interest in the lessee than the lessor has; thus, unless the lessor is protected by some special statute or equity, the lessee takes subject to all claims of title which were enforceable against the lessor.[6]

Footnotes

1 Estate of Cook by Cook v. Gran-Aire, Inc., 182 Wis. 2d 330, 513 N.W.2d 652 (Ct. App. 1994).

2 City of Henderson v. Ashby, 179 Ky. 507, 200 S.W. 931, 14 A.L.R. 1018 (1918).
As to the necessity of the lessor's possession, see § 21.

[3] 2616 South Loop L.L.C. v. Health Source Home Care, Inc., 201 S.W.3d 349 (Tex. App. Houston 14th Dist. 2006).

[4] Standard Live Stock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A.L.R. 1239 (1928).
As to leases by agents of the lessor, see § 26.

[5] Western New York & P. Ry. Co. v. Riecke, 83 A.D. 576, 81 N.Y.S. 1093 (4th Dep't 1903).
As to the estoppel of a tenant to deny the landlord's title, see §§ 733 to 746.
As to ratification or estoppel with regard to a defectively executed lease, see § 33.

[6] Deseret Salt Co. v. Tarpey, 142 U.S. 241, 12 S. Ct. 158, 35 L. Ed. 999 (1891); Kremer v. Schutz, 82 Kan. 175, 107 P. 780 (1910).

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I. Landlord-Tenant Relationship

A. In General

§ 4. Necessity and effect of lessor's title—After-acquired title

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501, 502, 592, 620, 621

A.L.R. Library

Estoppel by lease: effect of lessor's after-acquired title or interest during lease term, 51 A.L.R.2d 1238

If a lessor purports to make a lease at a time when the lessor does not have title to the realty that is subject to that lease, or had only an equitable or partial interest in such realty, but then subsequently acquires legal title to the realty, such after-acquired title will inure to the benefit of the lessee by means of estoppel and will be subject to the lessee's rights under the lease.[1] The after-acquired title doctrine may be applied in favor of one holding the lease under an assignment from the original lessee.[2]

There are some differences of opinion as to the conditions essential to the estoppel and as to whether it depends on the existence of covenants of warranty or quiet enjoyment, express or implied.[3] The after-acquired title doctrine does not apply to any interest which was not purportedly granted, and it cannot operate to vest in the grantee or lessee a greater estate than the deed or lease itself would have conveyed.[4] Nor does the after-acquired title of the lessor inure to the benefit of the lessee where the lessor acquired and held such title in trust for a third person.[5]

Footnotes

[1] Robben v. Obering, 279 F.2d 381 (7th Cir. 1960) (applying Illinois law); Acree v. Shell Oil Co., 548 F. Supp. 1150 (M.D. La. 1982), judgment aff'd, 721 F.2d 524 (5th Cir. 1983) (applying Louisiana law); Columbian Carbon Co. v.

Kight, 207 Md. 203, 114 A.2d 28, 51 A.L.R.2d 1232 (1955); Hennebont Co. v. Kroger Co., 221 Pa. Super. 65, 289 A.2d 229 (1972); Texas City Dike & Marina, Inc. v. Sikes, 500 S.W.2d 953 (Tex. Civ. App. Houston 1st Dist. 1973), writ refused n.r.e., (Mar. 27, 1974).

[2] Angichiodo v. Cerami, 127 F.2d 848 (C.C.A. 5th Cir. 1942); Maxwell v. Carlon, 30 Cal. App. 2d 356, 86 P.2d 666 (3d Dist. 1939); Geneva Mineral Springs Co. v. Coursey, 45 A.D. 268, 61 N.Y.S. 98 (4th Dep't 1899); Caswell v. Llano Oil Co., 120 Tex. 139, 36 S.W.2d 208 (Comm'n App. 1931).

[3] Columbian Carbon Co. v. Kight, 207 Md. 203, 114 A.2d 28, 51 A.L.R.2d 1232 (1955); Schorr 5 cent to $1.00 Stores, Inc. v. Jacob Ellis Realties, Inc., 131 N.J. Eq. 499, 26 A.2d 65 (Ch. 1942); Caswell v. Llano Oil Co., 120 Tex. 139, 36 S.W.2d 208 (Comm'n App. 1931).

[4] Garrett v. Lion Oil & Refining Co., 173 Ark. 429, 292 S.W. 405 (1927); Loose-Wiles Biscuit Co. v. Deering Village Corp., 142 Me. 121, 48 A.2d 715 (1946); McKinnon v. Lane, 285 S.W.2d 269 (Tex. Civ. App. Fort Worth 1955), writ refused n.r.e.

[5] MacDonald v. Sanders, 207 S.W.2d 155 (Tex. Civ. App. Texarkana 1947), writ refused n.r.e.

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49 Am. Jur. 2d Landlord and Tenant § 5

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I. Landlord-Tenant Relationship

A. In General

§ 5. Conflict of laws regarding lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501, 502, 592, 620, 621

A.L.R. Library

Law governing validity and construction of, and rights and obligations arising under, a lease of real property, 15 A.L.R.2d 1199

The general principle that rights in and title to real property are governed by the law of the state in which the property is situated usually applies[1] in considering the question whether the law of the forum as distinguished from the law of the situs of the property governs questions concerning contractual rights arising under a lease.[2]

However, a lease, in addition to creating interests in rem or rights in the property itself, gives rise to personal rights and obligations; these personal rights and obligations, as distinguished from interests in rem created in the property by the lease, are to be governed by the law of the situs of the transaction, and not by the law of the situs of the property.[3] The law of the situs of the transaction is applied to determine the validity or construction of the provisions of a lease,[4] such as covenants to pay taxes,[5] provisions affecting the priority of the landlord's lien for rent[6] or affecting the question whether there was a constructive eviction of the lessee,[7] and rights to or in a deposit to secure performance of the lease.[8]

Footnotes

1 Am. Jur. 2d, Conflict of Laws § 22.

[2] Danbury Bldgs., Inc. v. Union Carbide Corp., 963 F. Supp. 2d 96 (D. Conn. 2013) (applying Connecticut law); In re American LaFrance, LLC, 461 B.R. 267 (Bankr. D. Del. 2011) (applying Delaware law); Regal Knitwear Co., Inc. v. M. Hoffman & Co., Inc., 96 Misc. 2d 605, 409 N.Y.S.2d 483 (Sup 1978).

[3] U.S. v. Warren R. Co., 127 F.2d 134 (C.C.A. 2d Cir. 1942); In re Barnett, 12 F.2d 73 (C.C.A. 2d Cir. 1926); Mallory Associates, Inc. v. Barving Realty Co., Inc., 300 N.Y. 297, 90 N.E.2d 468, 15 A.L.R.2d 1193 (1949).

[4] McCraw v. Simpson, 141 F.2d 789 (C.C.A. 10th Cir. 1944); Bath Gaslight Co. v. Rowland, 84 A.D. 563, 82 N.Y.S. 841 (2d Dep't 1903), aff'd, 178 N.Y. 631, 71 N.E. 1127 (1904).

[5] U.S. v. Warren R. Co., 127 F.2d 134 (C.C.A. 2d Cir. 1942); In re L.P. Hollander Co., 301 Mass. 278, 16 N.E.2d 35 (1938).

[6] Lee Wilson & Co. v. Fleming, 203 Ark. 417, 156 S.W.2d 893 (1941).

[7] Galleher v. O'Grady, 78 N.H. 343, 100 A. 549 (1917).

[8] Mallory Associates, Inc. v. Barving Realty Co., Inc., 300 N.Y. 297, 90 N.E.2d 468, 15 A.L.R.2d 1193 (1949).

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I. Landlord-Tenant Relationship

A. In General

§ 6. Criminal responsibility of landlord

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 501, 502, 592, 620, 621

The mere relation of landlord and tenant generally does not render the landlord criminally liable for the illegal use of the premises by the tenant.[1] However, the landlord is criminally liable if the landlord aids or abets the tenant in illegal use of the premises.[2]

Footnotes

1 Kessler v. Pearson, 126 Ga. 725, 55 S.E. 963 (1906); Blocker v. Commonwealth, 153 Ky. 304, 155 S.W. 723 (1913); People v. Kent, 151 Mich. 134, 114 N.W. 1012 (1908).

2 Kessler v. Pearson, 126 Ga. 725, 55 S.E. 963 (1906); Blocker v. Commonwealth, 153 Ky. 304, 155 S.W. 723 (1913).

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49 Am. Jur. 2d Landlord and Tenant I B Refs.

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I. Landlord-Tenant Relationship

B. Occupancy of Premises as Tenant or as Employee

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Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 507, 508, 513

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I. Landlord-Tenant Relationship

B. Occupancy of Premises as Tenant or as Employee

§ 7. Occupancy of premises as tenant or as employee, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 507, 508, 513

The question has frequently arisen as to whether a transaction by which a person is to occupy or manage real estate of another is to be considered a lease or, rather, as a mere employment as agent or employee.[1] If there is no reservation of rent eo nomine or substantially, this is a strong consideration to show that no lease was intended.[2] However, if there is a stipulation for the payment of rent eo nomine or substantially, this is a material consideration tending to show that the occupation was as a tenant.[3] The fact that the rent is paid for in work does not preclude a landlord-tenant relationship.[4] Nor does the fact that the compensation of the landowner is a stated part of the profits received by the tenant from the use and occupation of the premises prevent the transaction from being considered a lease.[5] A person may have both an employment and a tenancy relationship with another.[6]

Whether a particular relation is that of landlord and tenant generally is a question of fact for the jury,[7] unless the underlying facts are undisputed and diverse inferences may not reasonably be drawn from them.[8]

Footnotes

1 Lane v. Au Sable Elec. Co., 181 Mich. 26, 147 N.W. 546 (1914); Najewitz v. City of Seattle, 21 Wash. 2d 656, 152 P.2d 722 (1944).
As to the nature of an agreement whereby one person agrees to raise crops upon the land of the other in return for a share of the crops, see Am. Jur. 2d, Crops §§ 41 to 55.

2 Mead v. Owen, 80 Vt. 273, 67 A. 722 (1907).

3 Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274, 35 A.L.R. 568 (1924).

4 Huus v. Ringo, 76 N.D. 763, 39 N.W.2d 505 (1949).

As to rental satisfied by service where the occupation is independent of the service, generally, see § 9.
As to the occupation of premises as part of the compensation where the occupation is incidental to service, see § 8.

5 Van Avery v. Platte Val. Land & Inv. Co., 133 Neb. 314, 275 N.W. 288 (1937).

6 Stewart v. Johnson, 209 W. Va. 476, 549 S.E.2d 670 (2001).

7 Graniteville Mfg. Co. v. Renew, 113 S.C. 171, 102 S.E. 18 (1920).

8 Guiel v. Barnes, 100 Conn. 737, 125 A. 91 (1924).

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I. Landlord-Tenant Relationship

B. Occupancy of Premises as Tenant or as Employee

§ 8. Occupancy incidental to service

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 513

A person who occupies the premises of the person's employer as part compensation for such employment generally is considered to be in possession as an employee, rather than as a tenant, where the occupancy is connected with and incidental to, or is required for the necessary or better performance of, the employee's services.[1]

The employee, being in occupancy of the employer's property, holds possession in subordination to the title of the employer.[2] Accordingly, the employee cannot authorize a third person, contrary to the will or wish of the employer, to enter or be upon the property, and the employee cannot bring anyone into the employer's house to live without the employer's consent.[3]

The Uniform Residential Landlord and Tenant Act does not apply to occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises.[4] Likewise, the Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, does not apply to occupancy by an employee of a landlord when the employee's right to occupancy is conditioned on employment in or about the premises.[5]

Footnotes

1 Moore v. Williams College, 702 F. Supp. 2d 19, 258 Ed. Law Rep. 606 (D. Mass. 2010), aff'd, 414 Fed. Appx. 307, 267 Ed. Law Rep. 537 (1st Cir. 2011) (applying Massachusetts law); Johnson v. Blocton-Cahaba Coal Co., 205 Ala. 373, 87 So. 559 (1921); Guiel v. Barnes, 100 Conn. 737, 125 A. 91 (1924); GENC Realty LLC v. Nezaj, 52 A.D.3d 415, 860 N.Y.S.2d 106 (1st Dep't 2008); Bennardo v. Searchwell, 54 Misc. 3d 924, 43 N.Y.S.3d 878 (Dist. Ct. 2016); Lee v. Wallace, 186 Ohio App. 3d 18, 2010-Ohio-250, 926 N.E.2d 328 (8th Dist. Cuyahoga County 2010); Montgomery v. Howard Johnson Inn, Gresham, 228 Or. App. 315, 208 P.3d 503 (2009); Virginia Iron, Coal & Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925).

2 Tipsword v. Potter, 31 Idaho 509, 174 P. 133, 6 A.L.R. 527 (1918).

[3] Tipsword v. Potter, 31 Idaho 509, 174 P. 133, 6 A.L.R. 527 (1918); Tucker v. Burt, 152 Mich. 68, 115 N.W. 722 (1908).

[4] Unif. Residential Landlord and Tenant Act § 1.202(5).

[5] Revised Uniform Residential Landlord and Tenant Act § 103(c)(6).

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I. Landlord-Tenant Relationship

B. Occupancy of Premises as Tenant or as Employee

§ 9. Occupancy independent of service

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 507, 508, 513

Where an employee's occupancy of premises owned by his or her employer is not a mere incident to the service, the relation of landlord and tenant exists even though the rental is satisfied by service.[1] An employer may pay an employee by conferring on the employee an interest in real property, either in fee for years or at will, or for any other estate or interest; if the employer does so, the employee then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration.[2] Accordingly, where the occupancy is exclusive and independent of, and not directly connected with, the service, the holding generally is as a tenant.[3]

Footnotes

1 Huus v. Ringo, 76 N.D. 763, 39 N.W.2d 505 (1949); United East & West Oil Co. v. Dyer, 139 Tex. 318, 162 S.W.2d 680 (Comm'n App. 1942).

2 United East & West Oil Co. v. Dyer, 139 Tex. 318, 162 S.W.2d 680 (Comm'n App. 1942); Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274, 35 A.L.R. 568 (1924).

3 Mackenzie v. Minis, 132 Ga. 323, 63 S.E. 900 (1909); Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274, 35 A.L.R. 568 (1924).

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I. Landlord-Tenant Relationship

B. Occupancy of Premises as Tenant or as Employee

§ 10. Effect of termination of service on occupancy

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 513

The right to retake possession of the premises on the termination of the relation of employer and employee may be given to the employer by the express terms of the contract between them.[1] In the absence of such a provision, where an employee occupies the premises as a tenant, the employee's right of occupation would seem to be terminable according to the rules applicable to tenancies.[2] If an employee, as a part of the employee's compensation, occupies premises belonging to the employer, the employee has no right to continue occupation of the premises on the termination of the employee's employment, in the absence of some right to that effect arising out of the terms of the contract by which the employee was given possession.[3] In the absence of such a provision, the employer may take immediate possession and use such force as necessary to expel the employee.[4] Whether the discharge of the employee was justified does not affect the employer's right to oust the employee; if the discharge was unjustified, the employee's remedy is by an action on the contract of employment.[5]

Footnotes

1 Virginia Iron, Coal & Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925).

2 Graniteville Mfg. Co. v. Renew, 113 S.C. 171, 102 S.E. 18 (1920); Angel v. Black Band Consol. Coal Co., 96 W. Va. 47, 122 S.E. 274, 35 A.L.R. 568 (1924).

3 Moore v. Williams College, 702 F. Supp. 2d 19, 258 Ed. Law Rep. 606 (D. Mass. 2010), aff'd, 414 Fed. Appx. 307, 267 Ed. Law Rep. 537 (1st Cir. 2011) (applying Massachusetts law); GENC Realty LLC v. Nezaj, 52 A.D.3d 415, 860 N.Y.S.2d 106 (1st Dep't 2008); Bennardo v. Searchwell, 54 Misc. 3d 924, 43 N.Y.S.3d 878 (Dist. Ct. 2016).

4 Keefe v. City of Monroe, 9 La. App. 545, 120 So. 102 (2d Cir. 1929); Mackenzie v. Minis, 132 Ga. 323, 63 S.E. 900 (1909); Lane v. Au Sable Elec. Co., 181 Mich. 26, 147 N.W. 546 (1914); Homan v. Redick, 97 Neb. 299, 149 N.W. 782 (1914); Graniteville Mfg. Co. v. Renew, 113 S.C. 171, 102 S.E. 18 (1920); Virginia Iron, Coal & Coke Co. v.

Dickenson, 143 Va. 250, 129 S.E. 228 (1925).

[5] Davis v. Long, 45 N.D. 581, 178 N.W. 936, 14 A.L.R. 796 (1920).

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II. Leases and Agreements

A. Agreements for Lease

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531 to 539, 555

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II. Leases and Agreements

A. Agreements for Lease

1. In General

§ 11. Lease and agreement for lease distinguished

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531, 535, 536, 555

The rights and liabilities of the parties to a mere agreement for a lease are distinguishable from those of parties to an actual lease.[1] Whether an agreement is a lease or an agreement for a lease depends upon the intent of the parties as manifested by the language of the instrument.[2] Generally, where the agreement contemplates the execution of a formal lease at a future time, especially where its future execution is conditional, the instrument is an agreement for a lease, rather than a lease itself.[3] Where, however, an instrument contains apt words of present demise and where the estate granted and the terms of the demise are definite and explicit, the instrument generally is an actual lease rather than an agreement for a lease, although it also contains a provision or covenant for the execution of a more formal lease at a future time.[4] The fact that the term of the lease is to commence in the future does not prevent the agreement from being an actual lease.[5]

A defectively executed lease cannot be regarded as a contract for a lease, at least where the purported lessee has not taken possession of the premises and paid rent.[6] Nevertheless, a defectively executed lease may be evidence of a contract between the parties to make a lease.[7]

An oral agreement to lease, which contemplates a later writing, is legally enforceable only if the parties agree on the terms to be incorporated in the later writing.[8] However, in at least one jurisdiction, an oral agreement to create a lease is never enforceable.[9]

If the agreement for a lease is in writing and may be specifically enforced, the proposed lessee is generally in the same position with respect to liabilities and rights if the proposed lessee is not in default in the execution of the lease as the proposed lessee would be under the contemplated lease.[10]

Footnotes

1 Carr Office Park, LLC v. Charles Schwab & Co., Inc., 291 Fed. Appx. 178 (10th Cir. 2008) (applying Colorado law); Aldora Aluminum & Glass Products, Inc. v. Poma Glass & Specialty Windows, Inc., 683 Fed. Appx. 764 (11th Cir. 2017) (applying Florida law); Taylan Realty Co. v. Student Book Exchange, Inc., 354 Mass. 777, 242 N.E.2d 877 (1968); Female Academy of Sacred Heart v. Doane Stuart School, 91 A.D.3d 1254, 937 N.Y.S.2d 682, 275 Ed. Law Rep. 966 (3d Dep't 2012).
As to agreements or provisions for extensions or renewals of leases, see §§ 133 to 136.

2 Byrd Companies, Inc. v. Birmingham Trust Nat. Bank, 482 So. 2d 247 (Ala. 1985); Plank v. Bourdon, 173 Ga. App. 391, 326 S.E.2d 571 (1985).

3 Weed v. Lindsay, 88 Ga. 686, 15 S.E. 836 (1892); Childers v. Lee, 1891-NMSC-009, 5 N.M. 576, 25 P. 781 (1891).

4 Engle v. Heier, 84 S.D. 535, 173 N.W.2d 454 (1970).

5 Motels of Md., Inc. v. Baltimore County, 244 Md. 306, 223 A.2d 609 (1966).

6 Granva Corp. v. Heyder, 205 Va. 660, 139 S.E.2d 77 (1964).
As to entry under an invalid lease, see §§ 101 to 104.

7 Wessel v. Newhof Stores, Inc., 11 Ohio Op. 476, 26 Ohio L. Abs. 621, 1 Ohio Supp. 374, 1938 WL 1526 (C.P. 1938).

8 Zeman v. Lufthansa German Airlines, 699 P.2d 1274 (Alaska 1985).

9 Whaler Motor Inn, Inc. v. Parsons, 2 Mass. App. Ct. 477, 314 N.E.2d 457 (1974).

10 International Harvester Co. of America v. Shreveport Nugrape Bottling Co., 13 La. App. 222, 127 So. 47 (2d Cir. 1930).
As to the right to specific performance of an agreement for a lease, see Am. Jur. 2d, Specific Performance §§ 163, 164.

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II. Leases and Agreements

A. Agreements for Lease

1. In General

§ 12. Requisites of agreement for lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531 to 539

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 2.5

The validity of an agreement to make a lease is governed by the contract provisions of the controlling statute of frauds.[1] An agreement for a lease must be certain as to the terms of the future lease; if it shows on its face that other details are to be settled between the parties, it is not binding.[2]

Footnotes

1 Restatement Second, Property: Landlord and Tenant § 2.5.

2 S. Jon Kreedman & Co. v. Meyers Bros. Parking-Western Corp., 58 Cal. App. 3d 173, 130 Cal. Rptr. 41 (2d Dist. 1976); Rivera v. Alaimo, 54 A.D.3d 325, 863 N.Y.S.2d 452 (2d Dep't 2008); Bevan v. Templeman, 145 Or. 279, 26 P.2d 775 (1933); Engle v. Heier, 84 S.D. 535, 173 N.W.2d 454 (1970); Saunders v. Callaway, 42 Wash. App. 29, 708 P.2d 652 (Div. 3 1985).
Neither a lease form nor an option agreement contained a final accord between a commercial landlord and a tenant concerning rent for a shared parking facility, and thus, no binding contract existed, but rather, the agreements between the parties constituted only an unenforceable "agreement to agree." Carr Office Park, LLC v. Charles Schwab & Co.,

Inc., 291 Fed. Appx. 178 (10th Cir. 2008) (applying Colorado law).

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II. Leases and Agreements

A. Agreements for Lease

1. In General

§ 13. Terms of contemplated lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531 to 539

The terms of the lease are governed by the provisions of the agreement, and where specific terms are not provided for by the agreement, the lease is to contain what is termed the usual, and only the usual, provisions.[1] In the absence of an express stipulation in the agreement for a lease, the lessor cannot be required to insert a provision restricting the lessee's right to assign or sublet.[2]

Caution:

Objection to a variance between a lease agreed upon and the one delivered is waived by refusal to accept any lease.[3]

Footnotes

1 Bennett v. Moon, 110 Neb. 692, 194 N.W. 802, 31 A.L.R. 495 (1923); Branner v. Kaplan, 138 Va. 614, 123 S.E. 668 (1924).

2 Farmer v. Davies, 97 N.J.L. 309, 116 A. 706 (N.J. Ct. Err. & App. 1922); Dolph v. Lennon's, Inc., 109 Or. 336, 220 P.

161 (1923).

[3] Neipris v. Graphic Laboratories, Inc., 4 Mass. App. Ct. 767, 339 N.E.2d 247 (1976).

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II. Leases and Agreements

A. Agreements for Lease

2. Actions for Breach

§ 14. Actions for breach of lease, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 535, 537, 538, 539

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Liability of lessee who refuses to take possession under executed lease or executory agreement to lease, 85 A.L.R.3d 514

An action for damages for the breach of an agreement for a lease by the other party may be maintained by the prospective lessor[1] or by the prospective lessee,[2] provided the plaintiff is not in default.[3]

Where one party refuses to perform, the other party may maintain an action at once, without waiting for the time agreed upon for the termination of the lease.[4]

A prospective tenant does not have a good-faith duty to enter into a final lease with the owner of commercial property, and thus, the tenant does not breach an implied covenant of good faith by failing to rent the property, where an express condition precedent in the parties' letter of intent, requiring the tenant's board to approve any lease, has not been satisfied.[5]

The vendors of real property do not enter into a lease agreement with the purchasers without any intention of honoring it, and thus the vendors do not breach an implied covenant of good faith and fair dealing, where the vendors pay some rent during the term of the lease, and the vendors likely would not have paid any rent had they intended to live on the property rent free.[6]

Footnotes

1 Buck v. Mueller, 207 Or. 169, 293 P.2d 736 (1956); Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260, 113 P. 630 (1911).
Since a letter required the parties to negotiate in good faith and only with each other toward a final lease, and to do so on an exclusive basis, the building owner's allegation that a prospective tenant was negotiating with other landlords from the beginning sufficed to state a cause of action for breach of an agreement to negotiate. 180 Water Street Associates, L.P. v. Lehman Bros. Holdings, Inc., 7 A.D.3d 316, 776 N.Y.S.2d 278 (1st Dep't 2004).

2 Neal v. Jefferson, 212 Mass. 517, 99 N.E. 334 (1912); Buck v. Mueller, 207 Or. 169, 293 P.2d 736 (1956).

3 Buck v. Mueller, 207 Or. 169, 293 P.2d 736 (1956).

4 Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260, 113 P. 630 (1911).

5 Massaro Ltd. Partnership (Park West Two) v. Baker & Taylor Inc., 161 Fed. Appx. 185 (3d Cir. 2005) (applying Pennsylvania law).

6 Matter of Monge, 826 F.3d 250 (5th Cir. 2016) (applying New Mexico law).

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II. Leases and Agreements

A. Agreements for Lease

2. Actions for Breach

§ 15. Measure and elements of damages for breach by proposed lessor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 535, 537 to 539

A.L.R. Library

Measure of damages for lessor's breach of contract to lease or to put lessee into possession, 88 A.L.R.2d 1024

A proposed lessee generally is entitled to recover as general damages the actual value of the proposed lessee's bargain as shown by the excess, if any, of the actual rental value of the premises over the agreed rent.[1] Special damages may also be recovered for losses that are the natural, direct, and necessary consequences of the breach where they are capable of being estimated by reliable data and are such as should reasonably have been contemplated by the parties.[2] Where there has been a willful refusal on the part of the proposed lessor to give possession, special damages consisting of expenses incurred by the lessee in preparing to move to and occupy the premises are recoverable.[3]

A lessee may recover as damages lost profits which would have been made by the lessee's business to be conducted on the premises covered by the agreement to lease (1) if those profits were within the contemplation of the parties when the agreement was made, (2) if their loss is the natural and proximate result of the lessor's breach of the agreement, and (3) if the amount of the lost profits is ascertainable with reasonable certainty.[4] However, in at least one jurisdiction, prospective future profits from a business to be established in the premises do not constitute an item of damages recoverable for breach of the agreement to lease because such damages are considered to be speculative, conjectural, and subject to the uncertainties of changing future conditions; however, an exception to this rule will be made where the loss is from the interruption of an established business and the plaintiff is able to show the amount of the lost profits to a reasonable certainty by use of competent proof.[5]

Observation:

The prospective lessee is seldom able to show future profits from a new business with sufficient certainty to support a recovery for lost profits.[6]

Damages resulting from the breach of a contract to lease cannot be recovered to the extent that the lessee could reasonably have avoided such damages.[7]

Footnotes

1 Combined Network, Inc. v. Equitable Life Assur. Soc. of the U.S., 805 F.2d 1292 (7th Cir. 1986) (applying Illinois law); Watson v. Lewis, 272 N.W.2d 459 (Iowa 1978); Gromelski v. Bruno, 336 Mass. 678, 147 N.E.2d 747 (1958); Tel-Ex Plaza, Inc. v. Hardees Restaurants, Inc., 76 Mich. App. 131, 255 N.W.2d 794 (1977); Quality Wig Co., Inc. v. J.C. Nichols Co., Inc., 728 S.W.2d 611 (Mo. Ct. App. W.D. 1987); Ravell Productions, Inc. v. Serota, 181 A.D.2d 723, 581 N.Y.S.2d 79 (2d Dep't 1992); Mitchell v. Preusse, 358 N.W.2d 511 (N.D. 1984); Baldassari v. Baldassari, 278 Pa. Super. 312, 420 A.2d 556 (1980); Pennsylvania State Shopping Plazas, Inc. v. Olive, 202 Va. 862, 120 S.E.2d 372, 88 A.L.R.2d 1016 (1961).

2 Moses v. Autuono, 56 Fla. 499, 47 So. 925 (1908); Savannah Inn-Towner Motor Inn, Inc. v. McCauley, 149 Ga. App. 209, 253 S.E.2d 796 (1979); Admae Enterprises, Ltd. v. 1000 Northern Blvd. Corp., 104 A.D.2d 919, 480 N.Y.S.2d 537 (2d Dep't 1984); Capitol Funds, Inc. v. White, 63 N.C. App. 785, 306 S.E.2d 142 (1983); Buck v. Mueller, 221 Or. 271, 351 P.2d 61 (1960); Frey v. Nakles, 380 Pa. 616, 112 A.2d 329 (1955).
It was foreseeable that the lessee would rely on the parties' agreement to agree to lease agreement by making significant expenditures in preparing to occupy the real property at issue, and therefore the lessee was entitled to recover amounts expended from the lessor in a breach of contract action, where the agreement to agree itself was a binding contract containing the essential terms of the parties' agreement, with or without a signed lease. GeoNan Properties, LLC v. Park-Ro-She, Inc., 2011 UT App 309, 263 P.3d 1169 (Utah Ct. App. 2011).

3 Kaye v. Melzer, 87 Cal. App. 2d 299, 197 P.2d 50 (1st Dist. 1948); Atyeo v. Paulsen, 319 N.W.2d 164 (S.D. 1982).

4 Bass v. Carpenter, 152 Ga. App. 298, 262 S.E.2d 578 (1979); Ellwest Stereo Theatres, Inc. v. Davilla, 436 So. 2d 1285 (La. Ct. App. 4th Cir. 1983), writ not considered, 442 So. 2d 454 (La. 1983); Redinger v. Standard Oil Co., 6 Mich. App. 74, 148 N.W.2d 225 (1967); Buck v. Mueller, 221 Or. 271, 351 P.2d 61 (1960); Frey v. Nakles, 380 Pa. 616, 112 A.2d 329 (1955).

5 Quality Wig Co., Inc. v. J.C. Nichols Co., Inc., 728 S.W.2d 611 (Mo. Ct. App. W.D. 1987).

6 Rogers v. Standard Oil Co., 130 Fla. 674, 178 So. 427 (1938); Weiss v. Revenue Building & Loan Ass'n, 116 N.J.L. 208, 182 A. 891, 104 A.L.R. 129 (N.J. Ct. Err. & App. 1936); Pennsylvania State Shopping Plazas, Inc. v. Olive, 202 Va. 862, 120 S.E.2d 372, 88 A.L.R.2d 1016 (1961).

7 Nunnally Co. v. Bromberg & Co., 217 Ala. 180, 115 So. 230 (1928); Moses v. Autuono, 56 Fla. 499, 47 So. 925 (1908); Huntington Easy Payment Co. v. Parsons, 62 W. Va. 26, 57 S.E. 253 (1907).

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II. Leases and Agreements

A. Agreements for Lease

2. Actions for Breach

§ 16. Measure and elements of damages for breach by proposed lessee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 535, 537 to 539

A.L.R. Library

Liability of lessee who refuses to take possession under executed lease or executory agreement to lease, 85 A.L.R.3d 514

Right to recover, in action for breach of contract, expenditures incurred in preparation for performance, 17 A.L.R.2d 1300

Where the proposed lessee refuses to take a lease in pursuance of an agreement to do so, an action will not lie against the lessee to recover the rent which the lessee was to pay; since an agreement for a lease does not create the relation of landlord and tenant and vests no estate in the proposed lessee, the stipulated return cannot be recovered as rent, and the lessee is liable only for damages for breach of the agreement.[1]

The measure of damages recoverable for the lessee's breach is the excess, if any, of the agreed rent over the actual rental value of the premises,[2] together with any special damages the plaintiff may plead and prove to have resulted from the breach.[3] If a prospective lessor, under a contract to lease the premises for a particular business, makes alterations in the property to adapt it to the use in that business, the lessor may recover the expense of such alterations as special damages for breach of the contract.[4] Loss of profits is the measure of damages for breach of an agreement to enter into a lease where the contract required the plaintiff to erect a building to suit the needs of the prospective tenant and where there was no market for the plaintiff's rental premises.[5] A lessor states plausible damages on a claim of breach of contract to lease against the proposed lessee for lost rental value, marketability, and tenancy on allegations that existing tenants in the lessor's shopping center were profitable and that the proposed lessee's construction of a gas station would have benefited those entities, making the shopping center more desirable and allowing the lessor to raise rents for those commercial spaces, and the lessor did not

renew the lease of an existing tenant to accommodate the proposed lessee and, thus, sustained damages as a direct result of the proposed lessee's breach of contract.[6]

Upon a prospective tenant's breach of contract to make a lease, the landlord is under a duty to mitigate damages by accepting or procuring a new tenant.[7] However, even where the proposed lessor fails to execute the proposed lessor's duty to minimize all possible damages to the proposed lessee as soon as the breach is committed, the lessor is at least entitled to nominal damages for the mere breach of the proposed lessee's agreement to take the lease.[8] Even if a landlord has a duty to mitigate damages, the burden of proving a failure to mitigate is on the defendant, who must also show the amount by which the tenant's damages were increased by failure to mitigate.[9]

Footnotes

1 Cooper v. Aiello, 93 N.J.L. 336, 107 A. 473 (N.J. Sup. Ct. 1919); Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260, 113 P. 630 (1911).

2 In re Builders Transport, Inc., 471 F.3d 1178 (11th Cir. 2006) (applying South Carolina law); Dickerson v. Menschel, 188 A.D. 547, 177 N.Y.S. 376 (1st Dep't 1919); H. S. & D. Investment Co. v. McCool, 139 Or. 266, 9 P.2d 809 (1932).

3 Cooper v. Aiello, 93 N.J.L. 336, 107 A. 473 (N.J. Sup. Ct. 1919); Oldfield v. Angeles Brewing & Malting Co., 62 Wash. 260, 113 P. 630 (1911).

4 Hope v. Sinclair Refining Co., 136 Kan. 353, 15 P.2d 432 (1932); Greany v. McCormick, 273 Mass. 250, 173 N.E. 411 (1930).

5 Brodsky v. Allen Hayosh Industries, Inc., 1 Mich. App. 591, 137 N.W.2d 771 (1965).

6 Boulevard Associates I, L.P. v. Wawa, Inc., 623 F. Supp. 2d 690 (E.D. Va. 2009) (applying Virginia law).

7 Greenstine v. Srere, 222 Mich. 25, 192 N.W. 676 (1923); Cooper v. Aiello, 93 N.J.L. 336, 107 A. 473 (N.J. Sup. Ct. 1919); F. Enterprises, Inc. v. Kentucky Fried Chicken Corp., 47 Ohio St. 2d 154, 1 Ohio Op. 3d 90, 351 N.E.2d 121 (1976); Wright v. Baumann, 239 Or. 410, 398 P.2d 119, 21 A.L.R.3d 527 (1965).

8 Greenstine v. Srere, 222 Mich. 25, 192 N.W. 676 (1923).

9 Stucki v. Noble, 963 S.W.2d 776 (Tex. App. San Antonio 1998).

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II. Leases and Agreements

A. Agreements for Lease

2. Actions for Breach

§ 17. Liquidated damages

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 539

A.L.R. Library

Measure of damages for lessor's breach of contract to lease or to put lessee into possession, 88 A.L.R.2d 1024

Provisions for liquidated damages in agreements or contracts for a lease generally are enforceable.[1] However, if a provision in an agreement to execute a lease providing for liquidated damages is construed as a penalty, it is generally void and unenforceable.[2]

Footnotes

1 Edward G. Acker, Inc., v. Rittenberg, 255 Mass. 599, 152 N.E. 87 (1926); Engelhardt v. Batla, 31 S.W. 324 (Tex. Civ. App. 1895).

2 Intertherm, Inc. v. Structural Systems, Inc., 504 S.W.2d 64 (Mo. 1974).

49 Am. Jur. 2d Landlord and Tenant II B Refs.

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II. Leases and Agreements

B. Formation of Lease; Validity

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531, 540, 542 to 563, 565

A.L.R. Library

A.L.R. Index, Landlord and Tenant
West's A.L.R. Digest, Landlord and Tenant 531, 540, 542 to 563, 565

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II. Leases and Agreements

B. Formation of Lease; Validity

1. In General

§ 18. Formation of lease; validity, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 542 to 562

A.L.R. Library

Requirements as to certainty and completeness of terms of lease in agreement to lease, 85 A.L.R.3d 414

The relation of landlord and tenant cannot exist without a contract, express or implied, or "lease."[1] A lease contract is the law between the parties in defining their respective rights and obligations.[2]

Definition:

A lease of real estate is an agreement for exclusive possession of lands, tenements, or hereditaments for life, for a term of years, or at will, or for any interest less than that of the lessor, usually for a specified rent or compensation; it creates in the lessee an interest in the real estate.[3]

A lease may be either express or implied;[4] however, a lease will never be implied where the acts and conduct of the parties

are inconsistent with its existence.[5] Whether a lease exists is to be determined from the intention of the parties, which is derived from the whole instrument or transaction.[6]

Essential requirements of a lease include the following: (1) a definite agreement as to the extent and bounds of the property, (2) a definite and agreed term, and (3) a definite and agreed rental price and manner of payment.[7] A lease describes the premises, parties, rent and term.[8]

Footnotes

1 Van Pelt v. Russell, 134 Ark. 236, 203 S.W. 267 (1918); Beck v. Minnesota & Western Grain Co., 131 Iowa 62, 107 N.W. 1032 (1906); Succession of Skinner v. Fuller, 466 So. 2d 535 (La. Ct. App. 3d Cir. 1985), writ denied, 472 So. 2d 36 (La. 1985); Joyner v. Greenville Hotel Associates Ltd. Partnership, 364 S.C. 237, 612 S.E.2d 727 (Ct. App. 2005); Dolen v. Lobit, 207 S.W. 143 (Tex. Civ. App. Galveston 1918), writ refused, (Mar. 12, 1919).
As to the nature of the landlord-tenant relationship, generally, see § 1.

2 Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp. Service Dist. No. 1, 426 F.3d 738 (5th Cir. 2005) (applying Louisiana law).

3 Chemical Petroleum Exchange, Inc. v. Metropolitan Sanitary Dist. of Greater Chicago, 81 Ill. App. 3d 1005, 37 Ill. Dec. 110, 401 N.E.2d 1203 (1st Dist. 1980); Read v. Mincks' Estate, 176 N.W.2d 192 (Iowa 1970); Terra Development Corp. v. Southland Dragway, Inc., 442 So. 2d 587 (La. Ct. App. 1st Cir. 1983), writ denied, 444 So. 2d 1225 (La. 1984); Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979).
As to the requisites of a valid lease, see §§ 22 to 33.
As to an agreement for a lease, see §§ 11 to 17.

4 Kransky v. Hensleigh, 146 Mont. 486, 409 P.2d 537 (1965); Reeder v. Reeder, 217 Neb. 120, 348 N.W.2d 832 (1984); Hispano Americano Advertising, Inc. v. Dryer, 112 Misc. 2d 936, 448 N.Y.S.2d 128 (N.Y. City Civ. Ct. 1982); Redgrave v. Schmitz, 584 S.W.2d 374 (Tex. Civ. App. San Antonio 1979); Snyder v. Callaghan, 168 W. Va. 265, 284 S.E.2d 241 (1981) (holding modified on other grounds by, Affiliated Const. Trades Foundation v. West Virginia Dept. of Transp., 227 W. Va. 653, 713 S.E.2d 809 (2011)).

5 Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U.S. 396, 12 S. Ct. 188, 35 L. Ed. 1055 (1892); Myer v. Roberts, 50 Or. 81, 89 P. 1051 (1907).

6 Smith v. Royal Ins. Co., 111 F.2d 667, 130 A.L.R. 812 (C.C.A. 9th Cir. 1940); Alexander v. Gardner, 123 Ky. 552, 29 Ky. L. Rptr. 958, 96 S.W. 818 (1906); Buswell v. Wentworth, 134 Me. 383, 186 A. 803 (1936); Union Central Life Ins. Co. v. Audet, 94 Mont. 79, 21 P.2d 53, 92 A.L.R. 571 (1933).
As to tenancies arising under supplemental leases, including tenancies arising from holding over and leases for renewed or extended terms, see §§ 133 to 136, 283, 285 to 288.
As to particular classes of tenancies, see §§ 110 to 126.

7 Citadel Group Ltd. v. Washington Regional Medical Center, 692 F.3d 580 (7th Cir. 2012) (applying Illinois law); Dargis v. Paradise Park, Inc., 354 Ill. App. 3d 171, 289 Ill. Dec. 420, 819 N.E.2d 1220 (2d Dist. 2004); Simmons Media Group, LLC v. Waykar, LLC, 2014 UT App 145, 335 P.3d 885 (Utah Ct. App. 2014).

8 Rossetto v. Barross, 90 Cal. App. 4th Supp. 1, 110 Cal. Rptr. 2d 255 (App. Dep't Super. Ct. 2001).
A valid lease contains four essential elements: (1) identity of landlord and tenant, (2) description of land to be leased, (3) a statement of the term of the lease, and (4) rental or other consideration to be paid. In re Persinger, 545 B.R. 896 (Bankr. E.D. N.C. 2016) (applying North Carolina law).
A valid lease must identify the parties, the property, the consideration, and the terms of payment. Wright v. IC Enterprises, Inc., 330 Ga. App. 303, 765 S.E.2d 484 (2014).

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II. Leases and Agreements

B. Formation of Lease; Validity

1. In General

§ 19. Nature of lease as conveyance or contract

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 542 to 544, 551, 553, 555, 562

A.L.R. Library

Law governing validity and construction of, and rights and obligations arising under, a lease of real property, 15 A.L.R.2d 1199

What constitutes a contract in writing within statute of limitations, 3 A.L.R.2d 809

A lease generally is considered to be both a conveyance of an estate and a contract.[1] It is a hybrid legal arrangement creating both privity of estate and privity of contract between the lessor and lessee.[2] However, a lease's contract characteristics generally are considered to prevail over its characteristics as a conveyance, and in the absence of a provision in the lease to the contrary, a lease is to be interpreted according to contract principles.[3]

It has also been held that a lease is a contract between the lessor and the lessee which sets forth their rights and obligations to each other in connection with the lessor's temporary grant of possession of its property to the lessee;[4] and that a lease of real property is in the nature of a contract and is controlled by principles of contract law.[5]

Footnotes

[1] In re Wolverton Associates, 909 F.2d 1286 (9th Cir. 1990); Misco Industries, Inc. v. Board of County Com'rs of

Sedgwick County, 235 Kan. 958, 685 P.2d 866 (1984); Southcross Commerce Center, LLP v. Tupy Properties, LLC, 766 N.W.2d 704 (Minn. Ct. App. 2009); Campus Lodge of Columbia, Ltd. v. Jacobson, 319 S.W.3d 549 (Mo. Ct. App. W.D. 2010); Hannan v. Dusch, 154 Va. 356, 153 S.E. 824, 70 A.L.R. 141 (1930).

[2] Allied Technology, Inc. v. R.B. Brunemann & Sons, Inc., 25 B.R. 484 (Bankr. S.D. Ohio 1982); Davidson v. Minnesota Loan & Trust Co., 158 Minn. 411, 197 N.W. 833, 32 A.L.R. 1418 (1924); Southcross Commerce Center, LLP v. Tupy Properties, LLC, 766 N.W.2d 704 (Minn. Ct. App. 2009); Mayer v. Dwiggins, 114 Neb. 184, 206 N.W. 744, 42 A.L.R. 1102 (1925).

[3] In re Spagnol Enterprises, Inc., 81 B.R. 337 (W.D. Pa. 1987); LaPonsie v. Kumorek, 122 N.H. 1021, 453 A.2d 1294 (1982); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985); Harold Schnitzer Properties v. Tradewell Group, Inc., 104 Or. App. 19, 799 P.2d 180 (1990); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986).

[4] Town of Kearny v. Discount City of Old Bridge, Inc., 205 N.J. 386, 16 A.3d 300 (2011).

[5] Northwest Sav. Bank and Financial Services v. NS First Street LLC, 802 F. Supp. 2d 580 (M.D. Pa. 2011) (applying Pennsylvania law).

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II. Leases and Agreements

B. Formation of Lease; Validity

1. In General

§ 20. Distinction between lease and license

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 531, 542, 543, 545, 555, 562

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 1.1

Whether an instrument is a license or a lease depends on the intention of the parties as ascertained from the instrument itself.[1] A license is an agreement which merely entitles a party to use the land of another for a specific purpose, subject to the management and control retained by the owner; a license conveys no interest in the land, is ordinarily not assignable, and may be contracted for or given orally.[2] In contrast, a lease conveys an interest in land, must be in writing in order to comply with the statute of frauds, and transfers possession of the land.[3] Exclusive possession of the leased premises is essential to the character of a lease;[4] if the instrument does not grant possession, but grants only the privilege to use the premises under the owner, the instrument is a license, not a lease.[5]

The denomination of an instrument as a "license" or a "lease" by the parties cannot alter or affect its true nature; it assumes its correct appellation by reason of the rights and obligations created by its terms under the law.[6]

A contract under which one party is authorized to install and maintain coin-operated laundry facilities on the premises of another was a license and not a lease where it gave the first party no right of possession to the premises, but merely the right, during certain hours, to enter for the limited purposes set forth in the contract.[7] There must be a conveyance of a definite space in order for a lease, rather than a license, to exist; both the extension and the location of the space within the lessor's premises must be specified.[8] A lease may also be distinguished from a license in that the term of a lease is limited to endure

for a definite and ascertained period, however short or long the period may be.[9]

A modification of an apartment lease to add a parking space to the lease is actually a license, not a lease, where the fact that the landlord has the right to change the space at will indicates that the apartment occupants were not given a possessory interest in a particular parking space.[10]

CUMULATIVE SUPPLEMENT

Cases:

Previous landowner's agreement with precast concrete product manufacturer for the rental of two-acre parcel of land to conduct its business was a lease which subsequent landowner could not cancel at will, rather than a mere license, even though agreement included restrictions on the use of the property; agreement stated it was effective for five years and listed the end date, contained provisions for monthly rent, and parties, throughout their interactions, treated the agreement as a lease until dispute arose about subsequent owner's notice to manufacturer to surrender the premises and its alleged unlawful conversion of manufacturer's personal property. Skaw ND Precast, LLC v. Oil Capital Ready Mix, LLC, 2019 ND 296, 936 N.W.2d 65 (N.D. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Millennium Park Joint Venture, LLC v. Houlihan, 393 Ill. App. 3d 13, 331 Ill. Dec. 696, 911 N.E.2d 517 (1st Dist. 2009), judgment aff'd, 241 Ill. 2d 281, 349 Ill. Dec. 898, 948 N.E.2d 1 (2010); Town of Kearny v. Municipal Sanitary Landfill Authority, 143 N.J. Super. 449, 363 A.2d 390 (Law Div. 1976); Mirasola v. Advanced Capital Group, Inc., 73 A.D.3d 875, 905 N.Y.S.2d 180 (2d Dep't 2010); Di Renzo v. Cavalier, 165 Ohio St. 386, 60 Ohio Op. 13, 135 N.E.2d 394 (1956).

2 Am. Jur. 2d, Easements and Licenses in Real Property § 107.

3 In re Harbour House Operating Corp., 26 B.R. 324 (Bankr. D. Mass. 1982); Baseball Pub. Co. v. Bruton, 302 Mass. 54, 18 N.E.2d 362, 119 A.L.R. 1518 (1938).
As to the requirement that a lease be in writing, see § 27.

4 § 21.

5 In re Harbour House Operating Corp., 26 B.R. 324 (Bankr. D. Mass. 1982); In re Lucre, Inc., 434 B.R. 807 (Bankr. W.D. Mich. 2010); Gage v. City of Topeka, 205 Kan. 143, 468 P.2d 232 (1970); Edgeboro, Inc. v. East Brunswick Tp., 31 N.J. Super. 238, 106 A.2d 337 (Ch. Div. 1954); Z. Justin Management Co., Inc. v. Metro Outdoor, LLC, 137 A.D.3d 577, 28 N.Y.S.3d 31 (1st Dep't 2016); Di Renzo v. Cavalier, 165 Ohio St. 386, 60 Ohio Op. 13, 135 N.E.2d 394 (1956).

6 Santa Fe Trail Neighborhood Redevelopment Corp. v. W.F. Coehn & Co., 154 S.W.3d 432 (Mo. Ct. App. W.D. 2005).

7 American Coin-Meter of Colorado Springs, Inc. v. Poole, 31 Colo. App. 316, 503 P.2d 626 (App. 1972).

8 Matter of Daben Corp., 469 F. Supp. 135 (D.P.R. 1979).
The landlord-tenant relationship exists only with respect to a space that is intended to have a fixed location for the duration of the lease. Restatement Second, Property: Landlord and Tenant § 1.1.

9 Howard v. County of Amador, 220 Cal. App. 3d 962, 269 Cal. Rptr. 807 (3d Dist. 1990).

[10] Dara Realty Associates, LLC v. Musheyev, 53 Misc. 3d 8, 37 N.Y.S.3d 811 (App. Term 2016).

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II. Leases and Agreements

B. Formation of Lease; Validity

1. In General

§ 21. Necessity of lessee's possession

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 542, 543, 555, 562

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 1.2

The lessee's possession of the leased premises is essential to the character of a lease.[1] To create a leasehold estate, the tenant must be vested with exclusive possession of the property to the lessee, even against the owner of the fee.[2] In addition, there is authority for the view that although a person may be in possession of the premises, the person is not a "lessee" unless the person also has exclusive control of the premises.[3]

Under the Uniform Landlord and Tenant Act, if the landlord fails to deliver possession of the premises to the tenant, rent abates until possession is delivered, and the tenant may (1) terminate the rental agreement upon at least five days' written notice to the landlord, and upon termination the landlord shall return all prepaid rent and security; or (2) demand performance of the rental agreement by the landlord and, if the tenant elects, obtain possession of the dwelling unit from the landlord or any person wrongfully in possession and recover the actual damages sustained by him or her.[4] In addition, if a person's failure to deliver possession is willful and not in good faith, an aggrieved person may recover from that person an amount not more than three months' periodic rent or threefold the actual damages sustained, whichever is greater, and reasonable attorney's fees.[5]

Footnotes

1 Chemical Petroleum Exchange, Inc. v. Metropolitan Sanitary Dist. of Greater Chicago, 81 Ill. App. 3d 1005, 37 Ill. Dec. 110, 401 N.E.2d 1203 (1st Dist. 1980).
A landlord-tenant relationship exists only if the landlord transfers the right to possession of the leased property. Restatement Second, Property: Landlord and Tenant § 1.2.

2 In re Belize Airways Ltd., 12 B.R. 387 (Bankr. S.D. Fla. 1981); Knox v. Gray, 289 Ark. 507, 712 S.W.2d 914 (1986); Danger Panda, LLC v. Launiu, 10 Cal. App. 5th 502, 216 Cal. Rptr. 3d 231 (1st Dist. 2017); Darr v. Lone Star Industries, Inc., 94 Cal. App. 3d 895, 157 Cal. Rptr. 90 (3d Dist. 1979); United Coin Meter Co. v. Gibson, 109 Mich. App. 652, 311 N.W.2d 442 (1981); Weathers v. M.C. Lininger & Sons, Inc., 68 Or. App. 30, 682 P.2d 770 (1984).

3 Gibson v. Greenfield, 561 S.W.2d 689 (Mo. Ct. App. 1978).

4 Unif. Residential Landlord and Tenant Act § 4.102(a).

5 Unif. Residential Landlord and Tenant Act § 4.102(b).

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II. Leases and Agreements

B. Formation of Lease; Validity

2. Requisites

a. Essential Terms

§ 22. Requisites for lease; essential terms, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 542 to 545, 555, 562

In order to be valid and enforceable, a lease generally must contain the following essential terms: (1) the names of the parties, (2) a description of the demised realty, (3) a statement of the term of the lease, and (4) the rent or other consideration.[1] However, some jurisdictions require somewhat different essential terms.[2]

Under the Uniform Residential Landlord and Tenant Act, a landlord and tenant may include in a rental agreement terms and conditions not prohibited by the Act or other rule of law, including rent, the term of the agreement, and other provisions governing the rights and obligations of the parties.[3] Under the Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, a lease may include terms and conditions not prohibited by the Act or law other than the Act.[4]

The mere fact that a lease term is essential does not mean that it has to be express in the contract.[5]

In order for an agreement to be enforceable as a lease, all the essential terms must be agreed upon,[6] and the agreed-upon terms must be definite.[7]

Footnotes

[1] Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 35 Fed. R. Serv. 2d 1188 (D.C. Cir. 1983); In re Persinger, 545 B.R. 896 (Bankr. E.D. N.C. 2016) (applying North Carolina law); Macke Laundry Service Co. v. Overgaard, 173 Mich. App. 250, 433 N.W.2d 813 (1988); Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511 (1984).

Certain essential factors must be present in the agreement to establish an oral lease, including the area to be leased, the duration of the lease, and the price to be paid. Slue v. New York University Medical Center, 409 F. Supp. 2d 349 (S.D. N.Y. 2006) (applying New York law).
As to the formal requirements of a lease, see §§ 27 to 33.

[2] Hanes v. Mid-America Petroleum, Inc., 577 F. Supp. 637 (W.D. Mo. 1983) (applying Missouri law; parties, subject matter, promises on both sides, price, and consideration); Bridges v. Anderson, 204 So. 3d 1079 (La. Ct. App. 4th Cir. 2016), writ denied, 216 So. 3d 817 (La. 2017), reconsideration not considered, 221 So. 3d 66 (La. 2017) (object of agreement, price, and parties' consent); Port of Coos Bay v. Department of Revenue, 298 Or. 229, 691 P.2d 100 (1984) (description of property, duration of term, and rental consideration); Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (extent and boundary of property, term, rental, and time and manner of payment); GeoNan Properties, LLC v. Park-Ro-She, Inc., 2011 UT App 309, 263 P.3d 1169 (Utah Ct. App. 2011) (the identity of the property to be leased, the term of the lease, and the rental amount).

[3] Unif. Residential Landlord and Tenant Act § 1.401(a).

[4] Revised Uniform Residential Landlord and Tenant Act § 201(a).

[5] First Nat. Mortg. Co. v. Federal Realty Inv. Trust, 631 F.3d 1058 (9th Cir. 2011) (applying California law).

[6] Calkins Corporate Park, LLC v. Eye Physicians and Surgeons of Western New York, P.L.L.C., 56 A.D.3d 1122, 868 N.Y.S.2d 427 (4th Dep't 2008).

[7] Jackson Park Yacht Club v. Illinois Dept. of Local Government Affairs, 93 Ill. App. 3d 542, 49 Ill. Dec. 212, 417 N.E.2d 1039 (1st Dist. 1981).

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§ 23. Description of premises in lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 545

A.L.R. Library

Specificity of description of premises as affecting enforceability of lease, 73 A.L.R.4th 236

In order to be valid, a lease must describe the premises demised with sufficient certainty to indicate what the parties intended the lease to convey; only such premises as are described or properly identified in the lease will pass to the lessee.[1] A lease must include a definite description of the property leased.[2] Where the description of the property in a lease agreement is indefinite, and contains no descriptive terms by the use of which the lands intended to be conveyed can be definitely located and identified, such instrument is fatally defective and void.[3] In order for land descriptions in leases to be sufficient, a surveyor should be able to locate boundaries by following the description.[4] The term essential to enforceability of a lease is not the legal description of the property, but the identity of the property; so long as the lease clearly identifies the property, the manner in which it is identified is irrelevant to enforceability.[5]

Where a lease describes the premises by metes and bounds, such description will prevail over that of an attached sketch or plat when they differ in describing the premises.[6]

Leases sometimes contain provisions for a modification as to the premises demised to the lessee, such as an option to the lessee to include additional space as a part of the demised premises.[7] Parol evidence may be considered to complete the

identification of the leased property.[8]

Parol evidence is not admissible to vary a plain description of the premises in a written lease.[9] However, an ambiguity or uncertainty in the description of the property renders parol evidence admissible to determine the premises demised.[10] Such evidence is admissible to identify the premises demised and remove a latent ambiguity.[11]

Footnotes

1 Jackson Park Yacht Club v. Illinois Dept. of Local Government Affairs, 93 Ill. App. 3d 542, 49 Ill. Dec. 212, 417 N.E.2d 1039 (1st Dist. 1981).

2 In re Anchorage Sportsplex, Inc., 462 B.R. 722 (Bankr. D. Alaska 2010) (applying California law); Action Apartment Ass'n v. Santa Monica Rent Control Bd., 94 Cal. App. 4th 587, 114 Cal. Rptr. 2d 412 (2d Dist. 2001), as modified, (Jan. 3, 2002); Millennium Park Joint Venture, LLC v. Houlihan, 241 Ill. 2d 281, 349 Ill. Dec. 898, 948 N.E.2d 1 (2010).

3 Verticality Inc. v. Warnell, 282 Ga. App. 873, 640 S.E.2d 369 (2006).

4 Trotter v. Gaddis and McLaurin, Inc., 452 So. 2d 453 (Miss. 1984).

5 Simmons Media Group, LLC v. Waykar, LLC, 2014 UT App 145, 335 P.3d 885 (Utah Ct. App. 2014).
A commercial lease was not rendered insufficient on the basis that the property description in the lease did not describe the leased premises, as the signature page containing the tenant's signature clearly stated the address of the property. Stewart v. Bridge Properties, LLC, 62 So. 3d 979 (Miss. Ct. App. 2010).

6 Duke v. Wilder, 212 Ga. 26, 90 S.E.2d 12 (1955).

7 Cassidy v. Montgomery Ward & Co., 216 Ind. 490, 25 N.E.2d 235, 129 A.L.R. 766 (1940).

8 § 45.

9 Stuart v. McCoy, 163 Miss. 551, 141 So. 899 (1932); Stein v. Bell Telephone Co. of Pennsylvania, 301 Pa. 107, 151 A. 690 (1930).

10 Keck v. Brookfield, 2 Ariz. App. 424, 409 P.2d 583 (1965).

11 McDaniel v. Willer, 216 S.W.2d 144 (Mo. Ct. App. 1948).

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§ 24. Consideration for lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 551, 553, 555

Where the amount of rent is not agreed upon and the contract does not otherwise provide a manner for its definite determination, the contract is void for uncertainty.[1] A lease must include an agreement for rent to be paid at particular times during a specified term.[2]

While the consideration for the use of the premises is usually in the form of rent payable in money, any consideration sufficient to support a contract is all that is required to constitute an agreement from which a tenancy may result.[3] The concept of what is considered reasonable or adequate consideration in a contract, such as a lease agreement, is measured by the notion of moderation; therefore, a court will not typically find the consideration in a contract to be inadequate unless the consideration given is so grossly inadequate as to shock the conscience, making it tantamount to fraud.[4] Consideration, as an element of a commercial lease agreement, is any benefit conferred or agreed to be conferred upon the promisor to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the promisor, other than such as the promisor is lawfully bound to suffer.[5] Consideration of one dollar per year, by itself, is not serious consideration as rent.[6] The fact that the rent is based on net profits or a percentage of sales does not preclude the creation of a landlord-tenant relationship,[7] although there is authority to the contrary.[8]

Parol evidence may be admitted to contradict or vary a mere recital of consideration in a lease.[9]

Footnotes

[1] Phipps v. Storey, 269 Ark. 886, 601 S.W.2d 249 (Ct. App. 1980); Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504

(1983).

[2] Action Apartment Ass'n v. Santa Monica Rent Control Bd., 94 Cal. App. 4th 587, 114 Cal. Rptr. 2d 412 (2d Dist. 2001), as modified, (Jan. 3, 2002).

[3] Department of Natural Resources v. Board of Trustees of Westminster Church of Detroit, 114 Mich. App. 99, 318 N.W.2d 830, 29 A.L.R.4th 166 (1982).
As to a tenant's obligation to pay rent, generally, see §§ 526 to 529.

[4] EP Hotel Partners, LP v. City of El Paso, 527 S.W.3d 646 (Tex. App. El Paso 2017).

[5] Worden v. Crow, 2013 Ark. App. 234, 427 S.W.3d 143 (2013).

[6] Daigle v. Vanderpool, 858 So. 2d 552 (La. Ct. App. 1st Cir. 2003).
A native village corporation's lease of property to a school district for one dollar per year was supported by consideration even apart from the payment rate; the lease contemplated construction and operation of a new school in the village served by the corporation. Askinuk Corp. v. Lower Yukon School Dist., 214 P.3d 259, 247 Ed. Law Rep. 982 (Alaska 2009).

[7] Johnson v. Murray Co., 90 S.W.2d 920 (Tex. Civ. App. Austin 1936), writ dismissed.

[8] Matter of Daben Corp., 469 F. Supp. 135 (D.P.R. 1979).
As to percentage leases, generally, see § 531.

[9] Elliott v. Marshall, 179 Ga. 639, 176 S.E. 770 (1934); Graham v. Dunlap, 1935 OK 1067, 179 Okla. 295, 65 P.2d 538 (1935); Pool v. Dunnam, 72 S.W.2d 398 (Tex. Civ. App. Beaumont 1934).

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§ 25. Parties to lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 544

A.L.R. Library

Admissibility of extrinsic evidence to identify person or persons intended to be designated by the name in which a contract is made, 80 A.L.R.2d 1137

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 1.3

A landlord-tenant relationship exists only if the parties have the legal capacity or requisite authority to enter into that relationship.[1]

A lease executed by only some owners of a piece of property is not binding upon other owners who are not parties to, and who did not authorize, the lease.[2]

Parol or extrinsic evidence is admissible to identify the real party in interest in a lease.[3] Parol evidence is also admissible to identify the person or persons intended to be designated by the name used in a lease.[4]

Footnotes

1 Restatement Second, Property: Landlord and Tenant § 1.3.

2 Herring v. Volume Merchandise, Inc., 249 N.C. 221, 106 S.E.2d 197, 78 A.L.R.2d 927 (1958).

3 Rex Liquor Stores v. McCart, 152 S.W.2d 376 (Tex. Civ. App. Waco 1941), writ refused w.o.m., (Oct. 8, 1941). As to the admission of parol or extrinsic evidence in the construction of leases, generally, see §§ 45 to 47.

4 Geary v. Taylor, 166 Ky. 501, 179 S.W. 426 (1915).

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§ 26. Parties to lease—Agents; ratification of unauthorized acts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 544

The general rules of agency apply to leases by an agent for a lessor.[1]

A lease made by an agent of the lessor should be made in the name of the agent's principal.[2]

If a lease is executed by an agent without authority, the lease is unenforceable, and it cannot be held good as a contract to make a lease as against the owner.[3] However, a lessor may ratify a lease made by the lessor's agent in the agent's own name and therefore become bound by the lease.[4] Similarly, where a lease is executed on the part of the lessor by an unauthorized agent, the lessor may ratify and confirm it and thereby render it binding on the lessor.[5] However, a principal may not ratify or be estopped from repudiating a lease that is beyond the scope of the principal's agent's authority, unless the principal has actual or constructive notice of the lease's terms; the principal has the right to presume that the tenant is in possession under the authority actually vested in the principal's agent.[6]

Footnotes

1 Standard Live Stock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A.L.R. 1239 (1928); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914).
As to implied authority to lease, see Am. Jur. 2d, Agency § 122.

2 Standard Live Stock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A.L.R. 1239 (1928); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914).

As to parol or extrinsic evidence with respect to parties to leases, generally, see § 25.

[3] Lithograph Bldg. Co. v. Watt, 96 Ohio St. 74, 117 N.E. 25 (1917); Hodesh v. Hallerman, 45 Ohio App. 278, 14 Ohio L. Abs. 395, 186 N.E. 921 (1st Dist. Hamilton County 1933).

[4] Kostopolos v. Pezzetti, 207 Mass. 277, 93 N.E. 571 (1911); Matzger v. Arcade Bldg. & Realty Co., 80 Wash. 401, 141 P. 900 (1914).

[5] Kostopolos v. Pezzetti, 207 Mass. 277, 93 N.E. 571 (1911).

[6] Clement v. Young-McShea Amusement Co., 70 N.J. Eq. 677, 67 A. 82 (Ct. Err. & App. 1906).

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§ 27. Necessity that lease be in writing; signature

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 540, 542, 543, 547, 555, 562

A.L.R. Library

Sufficiency of Description of Terms and Conditions of Lease, or Lease Provision, so as to Comply with Statute of Frauds, 12 A.L.R.6th 123

Forms

Am. Jur. Legal Forms 2d § 161:27 (Formal requirements—Execution)

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 2.1

No particular form or words are necessary to create a lease, as long as all essential elements of the lease are agreed upon by the parties.[1] Agreements between a landlord and tenant need not be in writing nor even expressed in words, and enforceable agreements may be implied in fact from the conduct of the parties.[2] A writing, incomplete in itself, is sufficient to be a lease if the contract provisions can be determined from separate but related writings; the writings need not be physically connected if they contain internal reference to other writings.[3] The existence of such a lease is a question of fact to be determined by consideration of all the facts and circumstances.[4] In some jurisdictions, state law provides that a lease can be either written or verbal.[5] If a lease is oral, however, it may be subject to the applicable statute of frauds[6] requiring that leases of a certain duration—typically of more than one year or of more than three years—be in writing and be signed by the party to be charged in order to be enforceable.[7] Some jurisdictions may require that a lease be signed by the lessor.[8] However, there is authority for the view that in the absence of statutory provisions to the contrary, where a lessor drafts a lease and delivers it to the lessee for signing, the lease is valid and binding upon the lessee's acceptance of the lease even if the lessor subsequently fails or refuses to sign the lease.[9]

Under both the Uniform Residential Landlord and Tenant Act, and the Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, if the landlord does not sign and deliver a written rental agreement that has already been signed and delivered to the landlord by the tenant, the landlord's acceptance of rent without reservation gives the agreement the same effect as if the landlord had signed and delivered it; under these circumstances, however, the agreement will be effective for only one year.[10]

Part performance of an oral lease may take the lease out of the operation of the applicable statute of frauds and may permit either specific performance of the lease or injunctive relief.[11]

A defective notary acknowledgment is not fatal to the enforceability of a lease as between parties who intended that it bind them.[12]

Footnotes

1 Baie v. Nordstrom, 238 Iowa 866, 29 N.W.2d 211 (1947).
As to the essential elements of a lease, see § 22.

2 Shreveport Plaza Associates Ltd. Partnership v. L.R. Resources II, 557 So. 2d 1067 (La. Ct. App. 2d Cir. 1990); Young v. Savinon, 201 N.J. Super. 1, 492 A.2d 385 (App. Div. 1985).
As to tenancies implied from entry or from entry and payment of rent, see §§ 101, 102.

3 Purchase Nursery, Inc. v. Edgerton, 153 N.C. App. 156, 568 S.E.2d 904 (2002).

4 L.U. Cattle Co. v. Wilson, 714 P.2d 1344 (Colo. App. 1986).

5 LaPorte v. Shirley, 798 So. 2d 1234 (La. Ct. App. 4th Cir. 2001), writ denied, 804 So. 2d 640 (La. 2001).

6 As to the application of statutes of frauds to leases, generally, see Am. Jur. 2d, Statute of Frauds §§ 82 to 87.

7 Opportunities Industrialization Center of Atlanta, Inc. v. Whiteway Neon Ad, Inc., 146 Ga. App. 871, 247 S.E.2d 494 (1978), judgment rev'd on other grounds, 243 Ga. 114, 252 S.E.2d 604 (1979).
A landlord-tenant relationship can be created orally if the duration of an oral lease does not exceed the period specified in the controlling statute of frauds. Restatement Second, Property: Landlord and Tenant § 2.1.

8 Penrod v. Lapere, 367 So. 2d 1381 (Ala. 1979); Greenstein v. Flatley, 19 Mass. App. Ct. 351, 474 N.E.2d 1130 (1985).

9 Martinez v. Zelenko, 625 So. 2d 524 (La. Ct. App. 5th Cir. 1993); Spann v. Gulley, 233 Miss. 62, 101 So. 2d 337 (1958).
A lease was binding on the landlord even though it was not signed by the landlord, since the landlord's offer of the lease was in compliance with its duty under the Rent Stabilization Code, and the offer was accepted by the tenant.

1997 Marcy Ave., Inc. v. Clinkscale, 16 Misc. 3d 78, 842 N.Y.S.2d 147 (App. Term 2007).

10 Unif. Residential Landlord and Tenant Act § 1.402(a), (c); Revised Uniform Residential Landlord and Tenant Act § 202(a)(1), (b).

11 Am. Jur. 2d, Statute of Frauds § 364.

12 Bernard Philip Dedor Revocable Declaration of Trust v. Res. Energy Exploration Co., 2014-Ohio-5383, 24 N.E.3d 1225 (Ohio Ct. App. 11th Dist. Portage County 2014).

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§ 28. Necessity that lease be in writing; signature—Signature by lessee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 547, 551, 553

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 2.2

Even if the lease provides that the lessee's signature is necessary in order for the lease to become binding, the lessor's conduct in delivering the lease without such formal execution is deemed a waiver of the lessor's right to insist upon a formal execution, and the lessor will be bound by the lease despite the lack of the lessee's signature.[1] Where a lessor drafts a lease and presents it to the lessee for signing, the lease is valid and binding upon the lessee's acceptance, even if the lessor fails to sign.[2]

Under both the Uniform Residential Landlord and Tenant Act and the Revised Uniform Residential Landlord and Tenant Act, if the tenant does not sign and deliver to the landlord a written rental agreement that has been signed and delivered to the tenant by the landlord, the landlord's acceptance of possession and payment of rent without reservation gives the agreement the same effect as if the tenant had signed and delivered it; however, under such circumstances the lease will be effective for only one year.[3]

Under the statute of frauds, a lease within the statute is valid if it is signed by the party to be charged.[4]

Footnotes

[1] Walker v. Dorn, 240 Cal. App. 2d 118, 49 Cal. Rptr. 362 (5th Dist. 1966); Spann v. Gulley, 233 Miss. 62, 101 So. 2d 337 (1958).

[2] Enterprise Property Grocery, Inc. v. Selma, Inc., 882 So. 2d 652 (La. Ct. App. 2d Cir. 2004), writ denied, 888 So. 2d 876 (La. 2004).

[3] Unif. Residential Landlord and Tenant Act § 1.402(b), (c); Revised Uniform Residential Landlord and Tenant Act § 202(a)(2), (b).

[4] Restatement Second, Property: Landlord and Tenant § 2.2.

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§ 29. Seal on lease

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West's Key Number Digest

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In the absence of a statute expressly providing otherwise, a lease for a term of years, however long, is not required to be under seal.[1] A majority of jurisdictions have abolished private seals by statute; in such jurisdictions, a seal affixed to a lease has no force or effect.[2] In states where the seal is still recognized, its primary legal significance is typically the application of a longer statute of limitations to an action on sealed instruments.[3]

Footnotes

1 Moche v. Leno, 227 N.C. 159, 41 S.E.2d 369 (1947).

2 Am. Jur. 2d, Seals § 2.

3 Whittington v. Dragon Group, L.L.C., 991 A.2d 1 (Del. 2009); Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), decision rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

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§ 30. Delivery of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 551, 552

Forms

Am. Jur. Legal Forms 2d § 161:29 (Formal requirements—Delivery, acceptance, and recordation)

Delivery is a prerequisite to the validity of a written lease,[1] but manual delivery is not necessary.[2] No particular form of words or action is necessary to constitute delivery of a lease, so long as there are acts or words or both which clearly manifest that it is the intent of the parties that an interest in land is being conveyed to the lessee.[3] The mere signing of the instrument by the parties not in the presence of each other, without more, does not evince such intent.[4]

Delivery is a mixed question of law and fact to be determined by the jury.[5]

Footnotes

[1] Corson v. Brown Motel Investments, Inc., 87 Cal. App. 3d 422, 151 Cal. Rptr. 385 (2d Dist. 1978); 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205 (1979); Sommerfeldt v. Pickett, 151 A.D.3d 1752, 56 N.Y.S.3d 752 (4th Dep't 2017).
As to the necessity of delivery of a lease in order to satisfy the statute of frauds, see Am. Jur. 2d, Statute of Frauds §

285.

[2] Sommerfeldt v. Pickett, 151 A.D.3d 1752, 56 N.Y.S.3d 752 (4th Dep't 2017); Scroggins v. Roper, 548 S.W.2d 779 (Tex. Civ. App. Tyler 1977), writ refused n.r.e., (May 11, 1977).

[3] Dlugosz v. O'Brien, 36 A.D.3d 1035, 828 N.Y.S.2d 628 (3d Dep't 2007); Scroggins v. Roper, 548 S.W.2d 779 (Tex. Civ. App. Tyler 1977), writ refused n.r.e., (May 11, 1977).

[4] 219 Broadway Corp. v. Alexander's, Inc., 46 N.Y.2d 506, 414 N.Y.S.2d 889, 387 N.E.2d 1205 (1979).

[5] Scroggins v. Roper, 548 S.W.2d 779 (Tex. Civ. App. Tyler 1977), writ refused n.r.e., (May 11, 1977).

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§ 31. Acceptance of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 551 to 553, 556

To render a lease binding and effectual, there must be an acceptance by the lessee; such acceptance may be expressed in words or in actions.[1]

Ignorance of the contents of a lease drafted by a tenant is no defense to a landlord's contractual obligation on such lease.[2]

Footnotes

1 St. Romain v. Midas Exploration, Inc., 430 So. 2d 1354 (La. Ct. App. 3d Cir. 1983).

2 Com., Dept. of General Services v. Lhormer Real Estate Agency, Inc., 120 Pa. Commw. 604, 549 A.2d 1008 (1988).

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§ 32. Recording of lease; acknowledgment and attestation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 556

A.L.R. Library

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 A.L.R.2d 920

Forms

Am. Jur. Legal Forms 2d § 161:28 (Formal requirements—Acknowledgment and attestation)

The recording acts of many states expressly mention leases, either including or excluding them, and in some states a lease is regarded as a "conveyance" or an "instrument affecting real estate" requiring recording,[1] while in other states a lease is held to be a chattel interest not requiring recording.[2] The term "lease" as used in a statute requiring recording of leases with terms longer than 20 years does not include a sublease.[3]

Some statutes require leases to be acknowledged for the purpose of recording the lease.[4] When a properly executed and acknowledged lease is filed for recording, it protects the parties to the lease against the intervening rights of third parties even

though it is not properly recorded.[5]

When a lease is properly acknowledged and placed on record as required by a statute, it is constructive notice of its existence, and a subsequent grantee is charged with notice of all that is shown by the record, including recitals in instruments so recorded.[6] An unrecorded lease can be acknowledged and assumed by third parties.[7]

While a lease must be recorded to be valid against a lien creditor or a third-party purchaser for value, recordation is not an element of a valid lease agreement between the original parties to the agreement.[8]

The purpose of recordation with respect to leases is the absolute protection of lessees from eviction by public declaration of their rights.[9] Recording statutes also offer protection to subsequent purchasers, lessees, and mortgagees.[10]

Statutes may require that a lease be attested by a certain number of witnesses.[11]

Footnotes

1 Winn-Dixie Stores, Inc. v. Dolgencorp, Inc., 964 So. 2d 261 (Fla. 4th DCA 2007); Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 333 N.E.2d 421 (1975).

2 Am. Jur. 2d, Records and Recording Laws § 52.

3 Rochester-Mobile, LLC v. C & S Wholesale Grocers, Inc., 2017 WL 2610508 (Ala. 2017).

4 As to acknowledgment as a requisite for recording, generally, see Am. Jur. 2d, Acknowledgments §§ 71 to 75; Am. Jur. 2d, Records and Recording Laws § 61.

5 Wasp Oil, Inc. v. Arkansas Oil and Gas, Inc., 280 Ark. 420, 658 S.W.2d 397 (1983).

6 Wilson v. Huff, 60 N.E.3d 294 (Ind. Ct. App. 2016).

7 Apex Realty, LLC v. Vidrine's of Gonzales, LLC, 112 So. 3d 301 (La. Ct. App. 5th Cir. 2013).

8 1426 46 St., LLC v. Klein, 60 A.D.3d 740, 876 N.Y.S.2d 425 (2d Dep't 2009); Purchase Nursery, Inc. v. Edgerton, 153 N.C. App. 156, 568 S.E.2d 904 (2002).

9 U.S. v. One Rural Lot Identified as FINCA No. 5991 Located in Barrio Pueblo, Puerto Rico, 726 F. Supp. 2d 61 (D.P.R. 2010) (applying Puerto Rico law).

10 Weathersby v. JPMorgan Chase Bank, N.A., 906 N.E.2d 904 (Ind. Ct. App. 2009).

11 Penrod v. Lapere, 367 So. 2d 1381 (Ala. 1979); Arvanetes v. Gilbert, 143 So. 2d 825 (Fla. 3d DCA 1962).

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49 Am. Jur. 2d Landlord and Tenant § 33

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II. Leases and Agreements

B. Formation of Lease; Validity

2. Requisites

b. Formal Requirements

§ 33. Ratification or estoppel as to defectively executed lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 540, 542, 543, 555, 562

A.L.R. Library

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 A.L.R.2d 920

Joining in instrument as ratification of or estoppel as to prior ineffective instrument affecting real property, 7 A.L.R.2d 294

A party to a lease may be estopped from asserting that the lease is invalid on the ground that it was executed improperly.[1] A lessor who accepts rental payments under a lease may be estopped from asserting the invalidity of that lease.[2] However, in order for a landlord to waive a substantive right to object to particular conduct on the part of a tenant, more than mere inadvertence is required.[3]

Defects in leases due to the nonjoinder of a spouse,[4] the lack or insufficiency of acknowledgment,[5] the want or insufficiency of description or identification,[6] the want or insufficiency of authority to execute the lease,[7] or the infancy of the lessor[8] may be cured through ratification or estoppel by the execution of a subsequent instrument recognizing the validity of the lease.

Footnotes

1 Waxman Industries, Inc. v. Trustco Development Co., 455 N.E.2d 376 (Ind. Ct. App. 1983).

2 Acme Cigarette Services, Inc. v. Gallegos, 91 N.M. 577, 1978-NMCA-036, 577 P.2d 885 (Ct. App. 1978).

3 Associated Realties v. Brown, 146 Misc. 2d 1069, 554 N.Y.S.2d 975 (N.Y. City Civ. Ct. 1990).

4 Wabash Drilling Co. v. Ellis, 230 Ky. 769, 20 S.W.2d 1002 (1929); Grissom v. Anderson, 125 Tex. 26, 79 S.W.2d 619 (1935).

5 Hill v. McIntyre Drilling Co., 59 S.W.2d 193 (Tex. Civ. App. Texarkana 1933), writ refused.
As to the acknowledgment of leases, generally, see § 32.

6 Cummings v. Midstates Oil Corporation, 193 Miss. 675, 9 So. 2d 648 (1942); Turner v. Hunt, 131 Tex. 492, 116 S.W.2d 688, 117 A.L.R. 1066 (Comm'n App. 1938).
As to the description of the premises as an essential lease term, see § 22.

7 Van Deventer v. Gulf Production Co., 41 S.W.2d 1029 (Tex. Civ. App. Beaumont 1931), writ refused, (Jan. 27, 1932).

8 Humble Oil & Refining Co. v. Clark, 126 Tex. 262, 87 S.W.2d 471 (Comm'n App. 1935).

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II. Leases and Agreements

B. Formation of Lease; Validity

3. Effect of Fraud, Mistake, or Illegality

§ 34. Effect of fraud on lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 558, 559

A.L.R. Library

Landlord's fraud, deceptive trade practices, and the like, in connection with mobile home owner's lease or rental of landsite, 39 A.L.R.4th 859

Proceeding under executory contract after discovering fraud as waiver of right to recover damages for the fraud, 13 A.L.R.2d 807

Fraud may render a lease void—as where the lease is made with the mistaken belief that it is not a lease, but a conveyance or contract of a different nature—or fraud may render the lease merely voidable at the option of the defrauded lessor[1] or at the option of the defrauded lessee,[2] in which case the party imposed upon may secure its cancellation or rescission.[3] Depending upon the nature and effect of a landlord's fraud giving rise to a tenant's avoidance of the lease, the tenant may be entitled to recover past rents paid or be liable for the agreed rent or for use and occupation prior to rescission.[4] Where a lease is signed by the lessee before it was filled in, proof beyond a reasonable doubt, rather than by a preponderance of evidence, of want of authority to complete a lease in the manner in which it was completed by the lessor's agent is not required to support a decree for cancellation.[5]

Another remedy of the defrauded party to a lease is by way of an action at law for damages for the fraud.[6]

A defrauded party, on discovery of the fraud, must exercise the party's right of rescission promptly, and a tenant's remaining in possession with knowledge of the fraud is a waiver of the right to rescind but is not a waiver of the tenant's claim for

damages for any fraud and deceit inducing the tenant to enter into the lease.[7] The tenant may, however, lose the right to charge fraud by specific acts of waiver.[8]

Footnotes

1 Robinson v. Marino, 145 Md. 301, 125 A. 701, 36 A.L.R. 692 (1924); Shell Petroleum Corp. v. Ford, 255 Mich. 105, 237 N.W. 378, 83 A.L.R. 1413 (1931).

2 Morton v. Hanes, 162 Mich. 366, 127 N.W. 269 (1910).

3 Kidder v. Greenman, 283 Mass. 601, 187 N.E. 42, 88 A.L.R. 1370 (1933).

4 National Conversion Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621, 298 N.Y.S.2d 499, 246 N.E.2d 351 (1969).

5 Kidder v. Greenman, 283 Mass. 601, 187 N.E. 42, 88 A.L.R. 1370 (1933).

6 Morton v. Hanes, 162 Mich. 366, 127 N.W. 269 (1910); Steefel v. Rothschild, 179 N.Y. 273, 72 N.E. 112 (1904).

7 Morton v. Hanes, 162 Mich. 366, 127 N.W. 269 (1910).

8 Madison Associates v. Bass, 158 Ill. App. 3d 526, 110 Ill. Dec. 513, 511 N.E.2d 690 (1st Dist. 1987).
As to waiver of the right to charge fraud by specific acts, generally, see Am. Jur. 2d, Fraud and Deceit §§ 312 to 314.

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II. Leases and Agreements

B. Formation of Lease; Validity

3. Effect of Fraud, Mistake, or Illegality

§ 35. Effect of fraud on lease—What constitutes fraud

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 558, 559

A.L.R. Library

Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 A.L.R.2d 923

In order for a lessee to show that a lessor fraudulently induced it into entering a lease agreement, the lessee must show (1) that the lessor committed the allegedly fraudulent act, (2) the act was material and false, (3) the lessee justifiably relied upon the act, and (4) the lessee was damaged because of the reliance.[1]

The test for fraudulent misrepresentation by a landlord which will relieve a tenant of the tenant's duties under a lease is the same as that applied in actions of tort for deceit.[2] False statements of opinion, of conditions to exist in the future, or of matters of a promissory nature are not actionable.[3]

Fraud must be affirmatively alleged and proved by the party who relies upon it for the purpose of either attack or defense; merely suspicious circumstances are not enough to show fraud.[4]

The fact that a lessor in the course of negotiations with a prospective lessee falsely represents that the lessor has received offers of rental or offers of a certain amount of rent constitutes actionable fraud.[5]

The concealment of facts known to the lessor and unknown and not obvious to the lessee and which seriously impair the

value of the lease may constitute fraud on the part of the lessor.[6]

Footnotes

1 J.S.K. Realty Co. v. New Plan Realty Trust, 9 Fed. Appx. 89 (4th Cir. 2001) (applying West Virginia law).

2 Golding v. 108 Longwood Ave., 325 Mass. 465, 91 N.E.2d 342 (1950).
As to the elements and requisites of deceit, generally, see Am. Jur. 2d, Fraud and Deceit §§ 20 to 23.

3 Majestic Coal Co. v. Anderson, 203 Ala. 233, 82 So. 483 (1919); Kusiciel v. LaSalle Nat. Bank, 106 Ill. App. 3d 333, 62 Ill. Dec. 245, 435 N.E.2d 1217 (1st Dist. 1982).
As to promises and statements as to future events as fraud, see Am. Jur. 2d, Fraud and Deceit §§ 84 to 86.

4 Cohen v. Santoianni, 330 Mass. 187, 112 N.E.2d 267 (1953).

5 Kabatchnick v. Hanover-Elm Bldg. Corp., 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952).

6 Guaranty Sav. Assur. Co. v. Uddo, 386 So. 2d 670 (La. Ct. App. 1st Cir. 1980), writ denied, 389 So. 2d 1126 (La. 1980).

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II. Leases and Agreements

B. Formation of Lease; Validity

3. Effect of Fraud, Mistake, or Illegality

§ 36. Effect of undue influence on lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 558

A lease may be void due to the exercise by one of the parties of undue influence in the execution of the lease.[1] To raise a presumption of undue influence in the execution of a lease, the evidence must show that (1) the lessor was enfeebled in mind when the lease was executed, and (2) the lessee stood in a confidential or fiduciary relationship to the lessor, either in a formal relationship or in a less formal relationship involving matters of a business nature.[2]

Footnotes

1 Benton v. Anderson, 571 S.W.2d 145 (Tenn. 1978).

2 Friendly Ice Cream Corp. v. Beckner, 268 Va. 23, 597 S.E.2d 34 (2004).

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49 Am. Jur. 2d Landlord and Tenant § 37

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II. Leases and Agreements

B. Formation of Lease; Validity

3. Effect of Fraud, Mistake, or Illegality

§ 37. Effect of mistake on lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 558

In accordance with the rules as to conveyances and contracts generally, the validity of the lease may be affected by a mistake of both parties[1] or by a mistake of one party coupled with the knowledge or inequitable conduct of the other.[2] Under some circumstances, a mistake in reducing an agreement to writing affects the validity of the written lease.[3] A mutual mistake as to the subject matter of a lease may be a ground for relief.[4]

The mistake may be asserted by the lessee or by the lessee's assignee[5] against the lessor, the lessor's heirs, or the lessor's grantees, but not against a bona fide purchaser.[6]

Mere unilateral mistake is immaterial; thus, in accordance with the rules as to contracts generally,[7] where a lease as properly interpreted has a single meaning, such meaning is binding upon the parties even though one of them meant something different.[8]

A lease entered into without a full understanding of its terms may be subsequently ratified by the lessor so that it will be binding on the lessor as if it were fully understood before its execution, and the lessor's receipt of the rent, without objection, is such a ratification.[9]

Footnotes

[1] Thrifty Payless, Inc. v. Americana at Brand, LLC, 218 Cal. App. 4th 1230, 160 Cal. Rptr. 3d 718 (2d Dist. 2013); Golding v. 108 Longwood Ave., 325 Mass. 465, 91 N.E.2d 342 (1950); White v. Kelly, 85 W. Va. 366, 101 S.E. 724, 26 A.L.R. 462 (1920).
As to parol evidence of mistake, see § 45.

[2] Chelsea Nat. Bank v. Smith, 74 N.J. Eq. 275, 69 A. 533 (Ch. 1908).

[3] Lamson v. Horton-Holden Hotel Co., 193 Iowa 355, 185 N.W. 472, 26 A.L.R. 465 (1921); White v. Kelly, 85 W. Va. 366, 101 S.E. 724, 26 A.L.R. 462 (1920).
As to cancellation or reformation for mistake in reducing an agreement to writing, see Am. Jur. 2d, Cancellation of Instruments §§ 27 to 31; Am. Jur. 2d, Reformation of Instruments §§ 12 to 19.

[4] Hannah v. Steinman, 159 Cal. 142, 112 P. 1094 (1911); Virginia Iron, Coal & Coke Co. v. Graham, 124 Va. 692, 98 S.E. 659 (1919).

[5] Bronk v. Standard Mfg. Co., 141 Mich. 680, 105 N.W. 33 (1905); Schneider v. Bulger, 194 S.W. 737 (Mo. Ct. App. 1917).

[6] Bott v. Campbell, 82 Or. 468, 161 P. 955 (1917).

[7] Am. Jur. 2d, Contracts § 202.

[8] Lamson v. Horton-Holden Hotel Co., 193 Iowa 355, 185 N.W. 472, 26 A.L.R. 465 (1921).

[9] Anderson v. Anderson, 251 Ill. 415, 96 N.E. 265 (1911).

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II. Leases and Agreements

B. Formation of Lease; Validity

3. Effect of Fraud, Mistake, or Illegality

§ 38. Effect of illegality on lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 562, 563, 565

A.L.R. Library

Rights between landlord and tenant as affected by zoning regulations restricting contemplated use of premises, 37 A.L.R.3d 1018

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant §§ 9.1, 12.4

A lease agreement, like any other contract, involves essentially a bargained-for exchange between the parties, and absent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party.[1] However, self-help is considered too likely to lead to a breach of the peace to be permitted, and contractual provisions in a lease purporting to authorize it will be void as against public policy.[2]

Under the Uniform Residential Landlord and Tenant Act, a rental agreement may not provide that the tenant:[3]

(1) agrees to waive or forego rights or remedies under the Uniform Act;

(2) authorizes confession of judgment on a claim arising out of the agreement;

(3) agrees to pay the landlord's attorney's fees; or

(4) agrees to exculpate or limit any liability of the landlord arising under law or to indemnify him or her for that liability.

If a landlord deliberately uses an agreement containing a prohibited provision, the tenant may recover actual damages, an amount up to three months' periodic rent, and reasonable attorney's fees.[4]

Under the Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, a lease may not require the tenant to:[5]

(1) waive or forego a right or remedy under the Uniform Act;

(2) authorize a person to confess judgment on a claim arising out of the lease or the Uniform Act;

(3) perform a duty to maintain the premises in habitable condition imposed on the landlord by the Uniform Act;

(4) agree to pay attorney's fees and costs of the landlord other than those provided by the Uniform Act or law other than the Uniform Act; or

(5) agree to exculpate or limit a liability of the landlord arising under the Uniform Act or law other than the Uniform Act or indemnify the landlordfor the liability and the costs connected with the liability.

If a landlord seeks to enforce the prohibited provision or accepts the tenant's voluntary compliance with the prohibited provision, the court may award the tenant an amount not to exceed three times the periodic rent.[6]

If premises are leased for a purpose that is prohibited by law and both parties to the lease know and intend that the premises be used for such a purpose, the lease generally is void and unenforceable by either party against the other.[7] Under this rule, it is not necessary that the lease itself set forth any illegal intent or use, as long as the lessor at the time of leasing knows and intends that the premises shall be used for an illegal purpose.[8] If the parties to the lease both intend that the leased property is to be used for a purpose illegal only under some circumstances, but both parties intend that the use will be carried on in an illegal manner, the law of contracts governs the effect of the illegality on the enforcement of the lease.[9] If the parties to the lease both intend that the leased property is to be used for several purposes and one of those purposes is illegal under all circumstances or illegal only under some circumstances, but both parties intend that the use will be carried on in an illegal manner, the law of contracts governs the effect of the illegality on the enforcement of the lease.[10] A lease providing for a use of premises which is prohibited by the zoning law is not necessarily illegal where it appears that an appeals board has the authority to permit a variance.[11]

A court will not afford relief to either party to an illegal agreement;[12] accordingly, a lessee of property to be used for an illegal purpose who is compelled to pay a rent note because of its transfer by the lessor to an innocent holder cannot hold the lessor liable for the amount paid on the theory that the negotiation of the invalid note was wrongful.[13] In addition, since a court of equity will not intervene to cancel an illegal contract if the parties to the contract are in pari delicto,[14] equity will not decree the cancellation of a lease executed to carry out a purpose proscribed by positive law or by accepted moral standards, but will leave the parties where their conduct has placed them.[15]

If, however, the lessor does not know that the lessee intends to use the premises for an unlawful purpose, the fact that the lessee intends to do so and carries out this intention will not prevent the landlord from recovering rent.[16]

If premises are leased with the understanding of both parties that they are to be used for an illegal purpose, the lessor incurs no liability to the lessee for ousting the lessee.[17]

An unlawful agreement which is only incidentally or indirectly connected with the lease does not taint the lease with illegality.[18]

Where a lease restricts and limits the use of premises let to a particular specified purpose, and thereafter, because of the

enactment of a valid statute, such use becomes unlawful, the subject matter of the contract is destroyed, and the covenants of such lease will not be enforced against either party thereto.[19]

Footnotes

1 Rowe v. Great Atlantic & Pac. Tea Co., Inc., 46 N.Y.2d 62, 412 N.Y.S.2d 827, 385 N.E.2d 566 (1978); Philadelphia Indemnity Insurance Company v. White, 490 S.W.3d 468 (Tex. 2016).

2 Pentecost v. Harward, 699 P.2d 696 (Utah 1985).

3 Unif. Residential Landlord and Tenant Act § 1.403(a).

4 Unif. Residential Landlord and Tenant Act § 1.403(b).

5 Revised Uniform Residential Landlord and Tenant Act § 203(a).

6 Revised Uniform Residential Landlord and Tenant Act § 203(b).

7 Sippin v. Ellam, 24 Conn. App. 385, 588 A.2d 660 (1991); Kessler v. Pearson, 126 Ga. 725, 55 S.E. 963 (1906); Cole v. Brown-Hurley Hardware Co., 139 Iowa 487, 117 N.W. 746 (1908); Rosenblath v. Sanders, 150 La. 882, 91 So. 252 (1922); Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934); Central States Health & Life Co. of Omaha v. Miracle Hills Ltd. Partnership, 235 Neb. 592, 456 N.W.2d 474 (1990); Young v. Texas Co., 8 Utah 2d 206, 331 P.2d 1099 (1958).
If the parties to the lease both intend that the leased property is to be used for a purpose illegal under all the circumstances, the lease is unenforceable against both the tenant and the landlord. Restatement Second, Property: Landlord and Tenant §§ 9.1, 12.4.

8 Bank of Commerce & Trust Co. v. Burke, 135 Tenn. 19, 185 S.W. 704 (1916).

9 Restatement Second, Property: Landlord and Tenant §§ 9.1, 12.4.

10 Restatement Second, Property: Landlord and Tenant §§ 9.1, 12.4.

11 12 Havemeyer Place Co., LLC v. Gordon, 93 Conn. App. 140, 888 A.2d 141 (2006).

12 Am. Jur. 2d, Contracts §§ 290 to 296.

13 Koepke v. Peper, 155 Iowa 687, 136 N.W. 902 (1912).

14 Am. Jur. 2d, Cancellation of Instruments § 41.

15 Campbell v. Gullo, 142 La. 1082, 78 So. 124 (1918).
As to forfeiture or cancellation for illegal use of demised premises, see §§ 253, 254.
As to the enforceability of a cause of action which is independent of an illegal agreement or transaction, generally, see Am. Jur. 2d, Contracts § 300.

16 Standard Brewing Co. v. Weil, 129 Md. 487, 99 A. 661 (1916); Bank of Commerce & Trust Co. v. Burke, 135 Tenn. 19, 185 S.W. 704 (1916).

17 Berni v. Boyer, 90 Minn. 469, 97 N.W. 121 (1903).

18 Jos. Schlitz Brewing Co. v. Nielsen, 77 Neb. 868, 110 N.W. 746 (1906).

19 Lucas Games Inc. v. Morris AR Associates, LLC, 197 So. 3d 1183 (Fla. 4th DCA 2016).

Works.

49 Am. Jur. 2d Landlord and Tenant II C Refs.

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II. Leases and Agreements

C. Construction and Operation of Leases

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 543, 590 to 611, 695(2), 833, 994, 995, 1000 to 1003, 1005 to 1013, 1015(3), 1018(1), 1018(2), 1020 to 1022, 1027, 1029(4), 1030(2), 1031(1) to 1031(3), 1048, 1054(3), 1054(5), 1055, 1083

A.L.R. Library

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II. Leases and Agreements

C. Construction and Operation of Leases

1. General Rules of Construction

a. Introduction

§ 39. Applicability of contract law to lease; parties' intent as controlling

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590 to 611, 695(2), 1013

It is well settled that leases are contracts as well as conveyances and, thus, the principles of contract construction apply to ascertain the scope and meaning of leases.[1] Like any other contract, the primary concern in interpreting a lease is to arrive at the intent of the contracting parties[2] at the time the lease was executed[3] or, in other words, at the time of contracting by the parties.[4] In the absence of an intention to create a landlord-tenant relationship, none is created.[5]

CUMULATIVE SUPPLEMENT

Cases:

Because a lease is a form of contract, a court construes a lease by applying the standard rules of contract interpretation. Hoyle, Tanner & Associates, Inc. v. 150 Realty, LLC, 215 A.3d 491 (N.H. 2019).

The provisions of a lease are interpreted according to general principles of contract law. North Carolina Indian Cultural Center, Inc. v. Sanders, 830 S.E.2d 675 (N.C. Ct. App. 2019).

[END OF SUPPLEMENT]

Footnotes

[1] Huang v. BP Amoco Corp, 271 F.3d 560 (3d Cir. 2001) (applying Pennsylvania law); N & L Enterprises, LLC v. Lioce Properties, LLP, 51 So. 3d 273 (Ala. 2010); Fuller Family Holdings, LLC v. Northern Trust Co., 371 Ill. App. 3d 605, 309 Ill. Dec. 111, 863 N.E.2d 743 (1st Dist. 2007); Whiteco Industries, Inc. v. Nickolick, 571 N.E.2d 1337 (Ind. Ct. App. 1991); Dunn v. Baker, 533 S.W.3d 831 (Mo. Ct. App. E.D. 2017); Bedrosky v. Hiner, 230 Neb. 200, 430 N.W.2d 535 (1988); LaPonsie v. Kumorek, 122 N.H. 1021, 453 A.2d 1294 (1982); RME Management, LLC v. Chapel H.O.M. Associates, LLC, 795 S.E.2d 641 (N.C. Ct. App. 2017), review denied, 804 S.E.2d 546 (N.C. 2017); Funke v. Aggregate Const., Inc., 2015 ND 123, 863 N.W.2d 855 (N.D. 2015); Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 519 A.2d 385 (1986); Pavuk v. Rogers, 2001 WY 75, 30 P.3d 19 (Wyo. 2001).

[2] Fortune Funding, LLC v. Ceridian Corp., 368 F.3d 985, 64 Fed. R. Evid. Serv. 579 (8th Cir. 2004) (applying Minnesota law); Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984); Chicago Housing Authority v. Rose, 203 Ill. App. 3d 208, 148 Ill. Dec. 534, 560 N.E.2d 1131 (1st Dist. 1990); Washington University v. Royal Crown Bottling Co. of St. Louis, 801 S.W.2d 458, 65 Ed. Law Rep. 235 (Mo. Ct. App. E.D. 1990); Goldman v. Orange County Chapter, New York State Ass'n for Retarded Children, Inc., 121 A.D.2d 683, 503 N.Y.S.2d 884 (2d Dep't 1986); Blackburn Food Corp. v. Ardi, Inc., 58 Misc. 3d 275, 66 N.Y.S.3d 840 (Sup 2017); Hallin v. Inland Oil & Gas Corporation, 2017 ND 254, 903 N.W.2d 61 (N.D. 2017); Steiner v. Minkowski, 72 Ohio App. 3d 754, 596 N.E.2d 492 (6th Dist. Lucas County 1991).

[3] Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985); Woodstock Soapstone Co., Inc. v. Carleton, 133 N.H. 809, 585 A.2d 312 (1991); Falcon Research & Development Co. v. Craddock, 1984-NMSC-044, 101 N.M. 122, 679 P.2d 264 (1984); Washington Hydroculture, Inc. v. Payne, 96 Wash. 2d 322, 635 P.2d 138 (1981).

[4] Woodstock Soapstone Co., Inc. v. Carleton, 133 N.H. 809, 585 A.2d 312 (1991).

[5] 270 Riverside Drive, Inc. v. Wilson, 195 Misc. 2d 44, 755 N.Y.S.2d 215 (N.Y. City Civ. Ct. 2003).

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II. Leases and Agreements

C. Construction and Operation of Leases

1. General Rules of Construction

a. Introduction

§ 40. Ambiguity in lease; what constitutes ambiguity

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 591, 593, 594, 596, 598, 611

Before judicial construction of a lease is appropriate to determine the intent of the parties to the lease, there must be an ambiguity in the lease; and in the absence of an ambiguity in the terms of a lease, no judicial construction is required or permitted.[1] Generally, a provision in a lease agreement is ambiguous if it is fairly susceptible to more than one sensible and reasonable interpretation,[2] or if it has no definite meaning[3] and reasonably intelligent persons would differ as to its meaning.[4] Ambiguous leases are those which are obscure in meaning due to an indefiniteness of expression or a double meaning.[5] However, a lease document is not ambiguous merely because the parties fail to agree on its meaning.[6] A lease is not ambiguous where it is entered into at arm's length and, ultimately, on terms resulting from suggestions and countersuggestions by which each of two sophisticated parties attempts to persuade the other to join it in a meeting of the minds, especially where the provision alleged to be ambiguous is not a novel one.[7]

The question of whether a lease is ambiguous or clear is a question of law for the court to determine, not a question of fact.[8]

Footnotes

1 Jones v. Kelley, 48 Or. App. 395, 616 P.2d 1215 (1980); Harbor Marine Corp. v. Briehler, 459 A.2d 489 (R.I. 1983); Addison County Automotive, Inc. v. Church, 144 Vt. 553, 481 A.2d 402 (1984).

2 Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371 (Colo. 1990); 19 Perry Street, LLC v. Unionville Water Co., 294 Conn. 611, 987 A.2d 1009 (2010); Dunn v. Baker, 533 S.W.3d 831 (Mo. Ct. App. E.D. 2017).

[3] Hayden Corp. v. Gayton, 98 Or. App. 703, 780 P.2d 787 (1989); Cremers v. Hallman, 403 S.W.3d 878 (Tex. App. Texarkana 2013).

[4] In re Estate of Fike, 385 Pa. Super. 627, 561 A.2d 1268 (1989).

[5] Harris Trust & Sav. Bank v. LaSalle Nat. Bank, 208 Ill. App. 3d 447, 153 Ill. Dec. 450, 567 N.E.2d 408 (1st Dist. 1990).

[6] Midway Park Saver v. Sarco Putty Co., 2012 IL App (1st) 110849, 364 Ill. Dec. 500, 976 N.E.2d 1063 (App. Ct. 1st Dist. 2012); Cheek v. Jackson Wax Museum, Inc., 2009 WY 151, 220 P.3d 1288 (Wyo. 2009).

[7] George Backer Management Corp. v. Acme Quilting Co., Inc., 46 N.Y.2d 211, 413 N.Y.S.2d 135, 385 N.E.2d 1062 (1978).

[8] § 44.

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1. General Rules of Construction

a. Introduction

§ 41. Inconsistency in terms of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 599

General rules of contract construction apply to resolve inconsistent terms or clauses within a lease.[1] The rule of construction which provides that an inconsistency between a general and a specific clause in a contract must be resolved in favor of the specific, applies to leases of real property.[2] Where two clauses of a lease are repugnant to each other and cannot stand together, the first will prevail and the later will fall.[3] If there are inconsistent clauses in a lease, they will be reconciled, if possible, and the intent of the parties as expressed in the lease will be enforced.[4]

Footnotes

1 Petrou v. Wilder, 557 So. 2d 617 (Fla. 4th DCA 1990); Square Lex 48 Corp. v. Shelton Towers Associates, 98 Misc. 2d 1039, 415 N.Y.S.2d 325 (Sup 1978).

2 Square Lex 48 Corp. v. Shelton Towers Associates, 98 Misc. 2d 1039, 415 N.Y.S.2d 325 (Sup 1978).

3 Petrou v. Wilder, 557 So. 2d 617 (Fla. 4th DCA 1990).

4 112 West 34th Street Associates, LLC v. 112-1400 Trade Properties LLC, 95 A.D.3d 529, 944 N.Y.S.2d 68 (1st Dep't 2012).

Works.

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1. General Rules of Construction

a. Introduction

§ 42. Inconsistency in terms of lease—Written, typed, and printed terms

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 599

Although effect should be given to both the printed and typed portions of a lease whenever possible, in the event of an inconsistency between the two, the typed portion will prevail.[1] Similarly, effect should be given to both the written and printed provisions of a lease if they are consistent with each other, or if they may be reconciled by a reasonable construction; however, if the different portions of the lease conflict, the written portion will control over the printed portion.[2] The reason greater effect is given to the written or typed part of a lease than to the printed part of it in the event of an inconsistency, is that the written or typed words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims.[3]

Footnotes

1 Lang v. Barciszewski, 643 S.W.2d 83 (Mo. Ct. App. E.D. 1982); Loblaw, Inc. v. Warren Plaza, Inc., 163 Ohio St. 581, 57 Ohio Op. 10, 127 N.E.2d 754 (1955).

2 Norton v. Insurance Services Office, 570 S.W.2d 328 (Mo. Ct. App. 1978).

3 Norton v. Insurance Services Office, 570 S.W.2d 328 (Mo. Ct. App. 1978).

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1. General Rules of Construction

a. Introduction

§ 43. Construction against lessor-drafter

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 594

It is a well-established general rule that ambiguous lease provisions will be construed in favor of the lessee and more strongly against the lessor[1] particularly where, as in most instances, the lessor drafted or prepared the lease[2] or furnished the lease and required the tenant to sign.[3] Where a lessor has drafted the lease, a court will not impose by judicial construction a responsibility upon the lessee unless the circumstances and the lease itself clearly indicate that the lessee intended to assume such a responsibility.[4] The rationale underlying this general rule is that a lease which contains an uncertainty or ambiguity should be construed against the author, or against the party who caused it,[5] and interpreted more favorably to the person who had no voice in the selection of the language used.[6] The general rule that a lease will be construed against the lessor-drafter and in favor of the lessee has been applied even where it was actually the lessor's predecessor in interest who drafted the lease, not the current lessor.[7]

Caution:

The general rule that ambiguous provisions in a lease should be construed against the lessor who prepared the lease and in favor of the lessee has been held not to apply in the situation where the lease is signed after extensive negotiations between the two parties resulting in a number of amendments to the lease as originally drafted.[8] The rule also has no applicability where the particular lease provision is clear and unambiguous[9] but, rather, is to be resorted to only when the words of the instrument are doubtful in meaning or susceptible to more than one construction.[10] Additionally, a tenant is not entitled to application of the general rule that ambiguities in a lease are construed against the drafter where there is no evidence that the landlord drafted the lease,[11] or where it was the lessee who drafted the lease.[12]

Footnotes

[1] Elderberry of Weber City, LLC v. Living Centers-Southeast, Inc., 794 F.3d 406 (4th Cir. 2015) (applying Virginia law); Rockstad v. Global Finance & Inv. Co., Inc., 41 P.3d 583 (Alaska 2002); Peachtree On Peachtree Investors, Ltd. v. Reed Drug Co., 251 Ga. 692, 308 S.E.2d 825 (1983); Towne Realty, Inc. v. Shaffer, 331 Ill. App. 3d 531, 265 Ill. Dec. 685, 773 N.E.2d 47 (4th Dist. 2002); Huard's, Inc. v. Southern States Management Corp., 450 So. 2d 36 (La. Ct. App. 3d Cir. 1984); Melrose Gates, LLC v. Chor Moua, 875 N.W.2d 814 (Minn. 2016); Car Wash Specialties, LLC v. Turnbull, 465 S.W.3d 481 (Mo. Ct. App. E.D. 2015); Funke v. Aggregate Const., Inc., 2015 ND 123, 863 N.W.2d 855 (N.D. 2015).

[2] Haddad v. Francis, 40 Conn. Supp. 567, 537 A.2d 174 (Super. Ct. 1986), judgment aff'd, 13 Conn. App. 324, 536 A.2d 597 (1988); Frog, Inc. v. Dutch Inns of America, Inc., 488 A.2d 925 (D.C. 1985); Sunset Center Properties, Ltd., By and Through Brookhill Capital Resources, Inc. v. Associated Medical Health Services, Inc., 585 So. 2d 977 (Fla. 3d DCA 1991); Thomas v. Knight, 457 So. 2d 1207 (La. Ct. App. 1st Cir. 1984); D & R Realty v. Bender, 230 Neb. 301, 431 N.W.2d 920 (1988); L. R. Property Management, Inc. v. Grebe, 1981-NMSC-035, 96 N.M. 22, 627 P.2d 864 (1981); Harbor Marine Corp. v. Briehler, 459 A.2d 489 (R.I. 1983); Trustees of Net Realty Holding Trust v. AVCO Financial Services of Barre, Inc., 147 Vt. 472, 520 A.2d 981 (1986); McGary v. Westlake Investors, 99 Wash. 2d 280, 661 P.2d 971 (1983); Thomas v. Goodwin, 164 W. Va. 770, 266 S.E.2d 792 (1980); Brazelton v. Jackson Drug Co., Inc., 796 P.2d 808 (Wyo. 1990).

[3] Bonneville on the Hill Co. v. Sloane, 572 P.2d 402 (Utah 1977).

[4] In re Bon Ton Restaurant and Pastry Shop, Inc., 53 B.R. 789 (Bankr. N.D. Ill. 1985).

[5] Markwell v. Addington, 303 Ky. 718, 198 S.W.2d 961 (1946); Hamilton v. Winter, 281 N.W.2d 54 (N.D. 1979).

[6] In re Evelyn Byrnes, Inc., 32 B.R. 825 (Bankr. S.D. N.Y. 1983).

[7] Trustees of Net Realty Holding Trust v. AVCO Financial Services of Barre, Inc., 147 Vt. 472, 520 A.2d 981 (1986).

[8] McDonald's Corp. v. Sandbothe, 814 S.W.2d 665 (Mo. Ct. App. E.D. 1991).

[9] Benchabbat v. Fidelity Acceptance Corp., 441 So. 2d 398 (La. Ct. App. 4th Cir. 1983); Thomas v. Goodwin, 164 W. Va. 770, 266 S.E.2d 792 (1980).

[10] Standard Garments, Inc. v. Hoffmann, 199 Md. 42, 85 A.2d 456, 30 A.L.R.2d 485 (1952).

[11] Frog, Inc. v. Dutch Inns of America, Inc., 488 A.2d 925 (D.C. 1985).

[12] Carl A. Schuberg, Inc. v. Kroger Co., 113 Mich. App. 310, 317 N.W.2d 606 (1982).

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a. Introduction

§ 44. Role of court and jury in construing lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 611

Where a provision in a lease is controverted, the court must initially determine whether, as a matter of law, the lease is a clear or ambiguous expression of the parties' intent; whether the lease is clear or ambiguous is not a question of fact.[1] If the terms of the lease are clear and unambiguous, then the proper interpretation and construction of the lease is also a question of law for the court to decide,[2] utilizing general rules of contract construction to determine the intention of the parties as reflected by the agreement.[3] Where neither the executed lease nor the facts and circumstances surrounding the lease are in dispute, the intention of the parties as expressed by the language employed is not a question for consideration by the fact finder.[4] However, where a lease is ambiguous, the resolution of conflicting extrinsic evidence offered to determine the parties' intent, is within the province of the trier of fact.[5]

Footnotes

1 Davenport Chester, LLC v. Abrams Properties, Inc, 870 F.3d 852 (8th Cir. 2017) (applying Iowa law); Hardin v. Kirkland Enterprises, Inc., 939 So. 2d 40 (Ala. Civ. App. 2006); Kurth v. Dobricky, 487 A.2d 220 (D.C. 1985); Walsh v. Nelson, 622 N.W.2d 499 (Iowa 2001); Huggins v. Huggins & Harrison, Inc., 220 Md. App. 405, 103 A.3d 1133 (2014); Hayden Corp. v. Gayton, 98 Or. App. 703, 780 P.2d 787 (1989); In re Estate of Fike, 385 Pa. Super. 627, 561 A.2d 1268 (1989); Fashion Place Inv., Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941 (Utah Ct. App. 1989).

2 J.G.M.C.J. Corp. v. Sears, Roebuck & Company, 391 F.3d 364 (1st Cir. 2004) (applying New Hampshire law); Elliott Enterprises, LLC v. Goodale, 166 Conn. App. 461, 142 A.3d 335 (2016); Peachtree On Peachtree Investors, Ltd. v. Reed Drug Co., 251 Ga. 692, 308 S.E.2d 825 (1983); Woodstock Soapstone Co., Inc. v. Carleton, 133 N.H. 809, 585

A.2d 312 (1991); Albert v. Dunlap Exploration, Inc., 457 S.W.3d 554 (Tex. App. Eastland 2015); Carbon Fuel Co. v. Gregory, 131 W. Va. 494, 48 S.E.2d 338, 2 A.L.R.2d 1143 (1948).

[3] Great Atlantic and Pac. Tea Co., Inc. v. Yanofsky, 380 Mass. 326, 403 N.E.2d 370 (1980); Ames v. George Victor Corp., 228 Neb. 675, 424 N.W.2d 106 (1988); Goldman v. Alkek, 850 S.W.2d 568 (Tex. App. Corpus Christi 1993), as amended on reh'g, (Mar. 11, 1993).

[4] Reliance Ins. Co. v. East-Lind Heat Treat, Inc., 175 Mich. App. 452, 438 N.W.2d 648 (1989).

[5] In re Estate of Fike, 385 Pa. Super. 627, 561 A.2d 1268 (1989).
As to the use of parol evidence in the construction and interpretation of leases, generally, see §§ 45 to 47.

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§ 45. Use of parol evidence to construe lease, generally

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590

A.L.R. Library

Statements in promotional or explanatory literature issued by lessor to lessee as ground for relief from lease contract, 43 A.L.R.3d 1386

Where the terms of a lease are complete and unambiguous, extrinsic[1] or parol[2] evidence may not be admitted to vary, contradict, add to, or explain those terms, or to prove that the agreement between the parties was different from what appears on its face, except in the event that there is evidence of fraud, accident, or mistake.[3] Rather, the parties' intent must be determined solely from the unambiguous terms of the written contract.[4]

Practice Tip:

The rule against admitting extrinsic evidence to contradict or add to the terms of a clear and unambiguous written lease does not prevent the court, in construing a lease, from giving effect to written contracts executed at the same time, and relating to the same subject matter as that of the lease,[5] pursuant to the general rule permitting the court to consider all such written contracts between the parties in ascertaining the true intent of the parties with regard to the lease.[6]

Footnotes

1 Fibreglas Fabricators, Inc. v. Kylberg, 799 P.2d 371 (Colo. 1990); Harris Trust & Sav. Bank v. LaSalle Nat. Bank, 208 Ill. App. 3d 447, 153 Ill. Dec. 450, 567 N.E.2d 408 (1st Dist. 1990); Hayden Corp. v. Gayton, 98 Or. App. 703, 780 P.2d 787 (1989); Inland American Retail Management LLC v. Cinemaworld of Florida, Inc., 68 A.3d 457 (R.I. 2013).

2 Lambros Metals v. Tannous, 71 Ariz. 53, 223 P.2d 570, 20 A.L.R.2d 933 (1950); Koshland v. American Woolen Co., 289 Mass. 308, 194 N.E. 102, 97 A.L.R. 928 (1935); Texas Co. v. Newton Naval Stores Co., 223 Miss. 468, 78 So. 2d 751, 49 A.L.R.2d 1182 (1955); Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 N.E.2d 881 (1950); Temple Enterprises v. Combs, 164 Or. 133, 100 P.2d 613, 128 A.L.R. 856 (1940); Goggin v. Goggin, 59 R.I. 145, 194 A. 730, 113 A.L.R. 569 (1937); Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281, 151 A.L.R. 275 (1943); Bernard v. Triangle Music Co., 1 Wash. 2d 41, 95 P.2d 43, 126 A.L.R. 558 (1939).

3 Stein v. Reising, 359 Mo. 804, 224 S.W.2d 80 (1949); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985); Thompson Development, Inc. v. Kroger Co., 186 W. Va. 482, 413 S.E.2d 137 (1991).

4 § 48.

5 Gardiner v. Burket, 3 Cal. App. 2d 666, 40 P.2d 279 (2d Dist. 1935); Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281, 151 A.L.R. 275 (1943); Texas Co. v. Northup, 154 Va. 428, 153 S.E. 659 (1930).

6 § 51.

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b. The Parol Evidence Rule

§ 46. Use of parol evidence for clarification of uncertain term; supplying missing term

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590

A.L.R. Library

Admissibility of oral agreement as to specific time for performance where written contract is silent, 85 A.L.R.2d 1269

The general rule that parol or extrinsic evidence is not admissible to vary, contradict, or explain the terms of a lease may not be applied so as to preclude the admission of evidence of extrinsic circumstances for the purpose of showing the intention of the parties where the terms of the lease are so indefinite and ambiguous that the intention of the parties cannot be ascertained from the instrument itself.[1] If a lease is ambiguous or incomplete, extrinsic[2] or parol[3] evidence may be necessary to ascertain the true intention of the parties and to explain the exact meaning of the terms used in the lease.[4] However, even then, the extrinsic or parol evidence may only be used to fix the meaning of words of doubtful import and cannot contradict the express terms of the writing.[5]

Observation:

The court, as a matter of law, must first determine whether the lease is ambiguous, before it determines whether extrinsic evidence is admissible.[6]

Similarly, if the court determines that the lease is only a partially integrated contract or, in other words, is an expression of the terms which it contains but not a complete expression of all terms agreed upon, there is authority holding that extrinsic evidence is admissible to prove omitted but not inconsistent terms.[7]

With regard to the situations in which parol or extrinsic evidence may be considered to aid in ascertaining the intent of the parties to a written lease in the event of an ambiguity or incomplete lease, the extrinsic evidence generally will consist of evidence regarding the position of the parties and the surrounding circumstances existing at the time of execution of the lease, as well as the party's subsequent conduct.[8]

CUMULATIVE SUPPLEMENT

Cases:

Under Maryland law, cost-sharing provisions of the long-term commercial lease, pursuant to which landlord and tenant agreed to split costs of certain structural repairs and maintenance during the term of the lease, were not ambiguous, and thus, neither parol evidence such as course-of-performance evidence, nor estoppel certificate and letter from landlord could be considered in interpreting the meaning of the cost-sharing provisions; language of cost-sharing provisions was clear, and the cost-sharing provisions did not conflict with other provisions of the lease, such as those expressly allocating certain maintenance and repair costs, including roof and window repairs, to tenant. Expo Properties, LLC v. Experient, Inc., 956 F.3d 217 (4th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 People v. Ganahl Lumber Co., 10 Cal. 2d 501, 75 P.2d 1067 (1938); Davenport v. National Fluorspar Co., 267 Ky. 713, 103 S.W.2d 84 (1937); McDaniel v. Willer, 216 S.W.2d 144 (Mo. Ct. App. 1948); Clifton Trust Co. v. Windsor Mfg. Co., 125 N.J.L. 619, 18 A.2d 35 (N.J. Sup. Ct. 1941); Reltron Corp. v. Voxakis Enterprises, Inc., 57 A.D.2d 134, 395 N.Y.S.2d 276 (4th Dep't 1977); United Interests, Inc. v. Brewington, Inc., 729 S.W.2d 897 (Tex. App. Houston 14th Dist. 1987), writ refused n.r.e., (Sept. 16, 1987).

2 Little v. Tuscola Stone Co., 234 Ill. App. 3d 726, 175 Ill. Dec. 812, 600 N.E.2d 1270 (4th Dist. 1992); Reltron Corp. v. Voxakis Enterprises, Inc., 57 A.D.2d 134, 395 N.Y.S.2d 276 (4th Dep't 1977); Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990).

3 Platt v. Clark, 141 Mont. 376, 378 P.2d 235 (1963); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985); Diversified Realty, Inc. v. McElroy, 41 Wash. App. 171, 703 P.2d 323 (Div. 3 1985).

4 Judge v. Wellman, 198 Ga. App. 782, 403 S.E.2d 76 (1991); Diversified Realty, Inc. v. McElroy, 41 Wash. App. 171, 703 P.2d 323 (Div. 3 1985).

5 Reltron Corp. v. Voxakis Enterprises, Inc., 57 A.D.2d 134, 395 N.Y.S.2d 276 (4th Dep't 1977).

6 Fashion Place Inv., Ltd. v. Salt Lake County/Salt Lake County Mental Health, 776 P.2d 941 (Utah Ct. App. 1989).

7 Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990).

8 Harris Trust & Sav. Bank v. LaSalle Nat. Bank, 208 Ill. App. 3d 447, 153 Ill. Dec. 450, 567 N.E.2d 408 (1st Dist. 1990).

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§ 47. Use of parol evidence on independent agreements collateral to lease

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 601

The doctrine that if an oral contract is independent of the written contract, and does not vary or contradict the terms of the latter, parol evidence is admissible to prove the oral contract,[1] has been considered applicable in cases involving leases.[2] Where there is a written lease, parol evidence may be admitted on the theory that it relates to an independent agreement collateral to the lease.[3]

Caution:

It is often a close question whether an oral agreement may be considered collateral to the written lease, or whether it is merely an attempt to vary its terms, and the salutary rule of evidence excluding extrinsic evidence to vary a written lease is not to be lightly departed from on the ground that the extrinsic agreement sought to be proved was collateral to the lease. Parol evidence is not admissible as proof of an agreement collateral to a lease in writing where the instrument contains provisions relating to the same subject, since in such a case the effect of the extrinsic evidence is to vary or add to the terms of the instrument.[4]

Footnotes

[1] Am. Jur. 2d, Evidence §§ 1133, 1134.

[2] Gardiner v. Burket, 3 Cal. App. 2d 666, 40 P.2d 279 (2d Dist. 1935); Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281, 151 A.L.R. 275 (1943).

[3] Gardiner v. Burket, 3 Cal. App. 2d 666, 40 P.2d 279 (2d Dist. 1935); Farr v. Wasatch Chemical Co., 105 Utah 272, 143 P.2d 281, 151 A.L.R. 275 (1943).

[4] Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 N.E.2d 881 (1950); A. J. Robbins & Co. v. Roberts, 610 S.W.2d 854 (Tex. Civ. App. Amarillo 1980), writ refused n.r.e., (Apr. 8, 1981).

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2. Factors Considered in Ascertaining Parties' Intent

a. Writing

§ 48. Use of writing to determine intent of parties to lease, generally; language used

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590

Where language used in a lease is controverted, the controlling factor is the intent expressed in the language of the written document itself, not the intention which may have existed in the minds of the parties at the time they entered into the lease, nor the intention the court believes the parties ought to have had.[1] Rather, if a lease is reduced to writing, a court must ascertain the intention of the parties from the writing alone, if possible,[2] the rationale being that the best indication of intent will ordinarily be found in the language of the lease.[3]

If there is a written lease, the provisions of the lease are conclusive and govern the rights of the parties; a party to the lease will not be relieved of obligations specified in the lease merely because the provisions are burdensome.[4] The function of the court is to enforce the lease as written, and not to write for the parties a different or better contract.[5] The rule that the intention of the parties is paramount in the construction of leases, cannot be used to justify expanding or limiting the rights of the parties as defined by the writing itself.[6] A lease is open to being construed by a court with reference to other factors when, and only when, the language used in the lease is reasonably or fairly susceptible to different constructions.[7]

Practice Tip:

The rule that the actual language used in the lease is controlling in ascertaining the parties' intent in entering into the lease applies not only as between the parties to the lease, but also as to a third person who is attacking the validity of the lease.[8]

Footnotes

[1] Camp Ne'er Too Late, LP v. Swepi, LP, 185 F. Supp. 3d 517 (M.D. Pa. 2016) (applying Pennsylvania law); Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985); Design Studio Intern., Inc. v. Chicago Title & Trust Co., 185 Ill. App. 3d 797, 133 Ill. Dec. 728, 541 N.E.2d 1166 (1st Dist. 1989); Southwestern Energy Production Co. v. Forest Resources, LLC, 2013 PA Super 307, 83 A.3d 177 (2013).

[2] Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); Stuttering Foundation, Inc. v. Glynn County, 301 Ga. 492, 801 S.E.2d 793 (2017); Chicago Housing Authority v. Rose, 203 Ill. App. 3d 208, 148 Ill. Dec. 534, 560 N.E.2d 1131 (1st Dist. 1990); Edward Rose of Indiana v. Fountain, 431 N.E.2d 543 (Ind. Ct. App. 1982); Washington University v. Royal Crown Bottling Co. of St. Louis, 801 S.W.2d 458, 65 Ed. Law Rep. 235 (Mo. Ct. App. E.D. 1990); Samos v. 43 East Realty Corp., 811 A.2d 642 (R.I. 2002); BP America Production Co. v. Zaffirini, 419 S.W.3d 485 (Tex. App. San Antonio 2013); Automatic Gas Distributors, Inc. v. State Bank of Green River, 817 P.2d 441 (Wyo. 1991).

[3] In re Eastern Systems, Inc., 105 B.R. 219 (Bankr. S.D. N.Y. 1989), judgment aff'd, 1991 WL 90733 (S.D. N.Y. 1991).

[4] In re GISC, Inc., 130 B.R. 346 (Bankr. M.D. Fla. 1991).

[5] GTM Investments v. Depot, Inc., 694 P.2d 379 (Colo. App. 1984); Port of Monmouth Development Corp. v. Middletown Tp., 229 N.J. Super. 445, 551 A.2d 1030 (App. Div. 1988).

[6] Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991).

[7] Schuster v. White Coffee Pot Family Inns, Inc., 43 Md. App. 550, 406 A.2d 452 (1979).

[8] Eckerle v. Twenty Grand Corp., 8 Mich. App. 1, 153 N.W.2d 369 (1967).

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a. Writing

§ 49. Plain and ordinary meaning of lease terms; effect of technical terms or words of art

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 596

In construing the terms of a lease, the court is required to give the document's language its common and generally accepted, or plain and ordinary meaning,[1] unless a technical or special meaning is clearly intended.[2] In instances where the terms of a lease are unambiguous, they must be enforced as written, and no court can rewrite a lease to provide a better bargain to suit one of the parties.[3] Thus, when interpreting lease agreements, a court determines whether the plain language of the agreement clearly addresses the issue at hand, and if the language is clear and addresses the disputed matter the inquiry ends.[4] Words used in a written lease which are not expressly defined by the lease, will be interpreted according to their common meaning.[5] If the language used in a lease is technical or constitutes terms of art, the general rule is that such language is to be given its common technical meaning when used within its special field.[6]

Footnotes

[1] Eucasia Schools Worldwide, Inc. v. DW August Co., 218 Cal. App. 4th 176, 159 Cal. Rptr. 3d 621, 295 Ed. Law Rep. 268 (2d Dist. 2013); Sears, Roebuck & Co. v. Forbes/cohen Florida Properties, L.P., 223 So. 3d 292 (Fla. 4th DCA 2017); Cho Mark Oriental Food, Ltd. v. K & K Intern., 73 Haw. 509, 836 P.2d 1057 (1992); Melrose Gates, LLC v. Chor Moua, 875 N.W.2d 814 (Minn. 2016); Car Wash Specialties, LLC v. Turnbull, 465 S.W.3d 481 (Mo. Ct. App. E.D. 2015); Tana Oil and Gas Corp. v. Cernosek, 188 S.W.3d 354 (Tex. App. Austin 2006).
Where a nontechnical word is not defined in a lease, an appellate court must interpret the word consistent with its plain dictionary meaning. Kroger Ltd. Partnership I v. Guastello, 177 N.C. App. 386, 628 S.E.2d 841 (2006).
A lease, like any other contract, should be interpreted according to the plain meaning of the language employed and courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. Saran v. Chelsea GCA Realty Partnership, L.P., 148 A.D.3d 1197, 50 N.Y.S.3d 463

(2d Dep't 2017).

[2] Prime Management Co., Inc. v. Steinegger, 904 F.2d 811 (2d Cir. 1990); Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985); Tomey Realty Co., Inc. v. Bozzuto's, Inc., 168 Conn. App. 637, 147 A.3d 166 (2016).

[3] Towne Realty, Inc. v. Shaffer, 331 Ill. App. 3d 531, 265 Ill. Dec. 685, 773 N.E.2d 47 (4th Dist. 2002).

[4] BMJ Partners v. King's Beauty Distributor Co., 508 S.W.3d 175 (Mo. Ct. App. E.D. 2016).

[5] Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc., 786 S.E.2d 335 (N.C. Ct. App. 2016), cert. allowed, review dismissed, 369 N.C. 41, 787 S.E.2d 394 (2016) and decision aff'd, 369 N.C. 722, 799 S.E.2d 611 (2017).

[6] Berg v. Hudesman, 115 Wash. 2d 657, 801 P.2d 222 (1990).

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a. Writing

§ 50. Construction of all clauses or parts of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 598

In construing a lease, the court must discern the intention of the parties to the lease as it is expressed in the language of the written document when read as a whole,[1] giving effect, if possible, to all parts or provisions of the instrument.[2] Specific words or clauses of an agreement are not to be treated as meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract.[3]

The court must make every effort to harmonize the provisions of a lease,[4] if that can be accomplished by the use of recognized and reasonable rules of construction.[5] Different provisions in a lease which deal with the same subject matter will be read together in ascertaining the parties' intent.[6] The same phrase used in different places in a lease is to be given the same meaning, unless a different meaning is required by the context.[7] Where the intention of the parties to a lease is not readily ascertainable from the words used in a particular clause, it must be inferred from a reading of the entire lease.[8]

CUMULATIVE SUPPLEMENT

Cases:

When construing disputed provisions in a lease, court must analyze the lease in its entirety. DiMinico v. Centennial Estates Cooperative, Inc., 173 N.H. 150, 238 A.3d 1004 (2020).

[END OF SUPPLEMENT]

Footnotes

[1] Western Assets Corp. v. Goodyear Tire & Rubber Co., 759 F.2d 595 (7th Cir. 1985); Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985); Wing v. Martin, 107 Idaho 267, 688 P.2d 1172 (1984); Ogilvie v. Steele by Steele, 452 N.E.2d 167 (Ind. Ct. App. 1983); Arista Real Estate Holdings, Inc. v. Kemalettin, 133 A.D.3d 696, 19 N.Y.S.3d 576 (2d Dep't 2015); Steiner v. Minkowski, 72 Ohio App. 3d 754, 596 N.E.2d 492 (6th Dist. Lucas County 1991); Delta Logistics, Inc. v. Employment Department, 279 Or. App. 498, 379 P.3d 783 (2016), review allowed, 360 Or. 697, 388 P.3d 707 (2016) and decision aff'd, 361 Or. 821, 401 P.3d 779 (2017).

[2] Mansfield Development Co. v. Centennial Enterprises, Inc., 38 Colo. App. 36, 554 P.2d 1362 (App. 1976), judgment aff'd, 193 Colo. 463, 568 P.2d 50 (1977); Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985); Tomey Realty Co., Inc. v. Bozzuto's, Inc., 168 Conn. App. 637, 147 A.3d 166 (2016); Grochowski v. Stewart, 53 Del. 330, 169 A.2d 14 (Super. Ct. 1961); Geyer v. Lietzan, 230 Ind. 404, 103 N.E.2d 199, 31 A.L.R.2d 601 (1952); MacFarlane v. Applebee's Restaurant, 2016 UT App 158, 378 P.3d 1286 (Utah Ct. App. 2016); Chesapeake Appalachia, L.L.C. v. Hickman, 236 W. Va. 421, 781 S.E.2d 198 (2015).

[3] Wood v. Sterling Drilling and Production Co., Inc., 188 W. Va. 32, 422 S.E.2d 509 (1992); Brazelton v. Jackson Drug Co., Inc., 796 P.2d 808 (Wyo. 1990).

[4] Quebe v. Davis, 586 N.E.2d 914 (Ind. Ct. App. 1992).

[5] B Town, Inc. v. Albright, 209 Neb. 819, 311 N.W.2d 908 (1981).

[6] Markey v. Smith, 301 Mass. 64, 16 N.E.2d 20, 118 A.L.R. 274 (1938); Ecclesiastes Production Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007).

[7] Eastern Massachusetts St. Ry. Co. v. Boston Elevated Ry. Co., 310 Mass. 659, 39 N.E.2d 647, 140 A.L.R. 506 (1942).

[8] Dunn v. Baker, 533 S.W.3d 831 (Mo. Ct. App. E.D. 2017); Bensons Plaza v. Great Atlantic & Pac. Tea Co., Inc., 55 A.D.2d 266, 389 N.Y.S.2d 947 (4th Dep't 1976), judgment rev'd on other grounds, 44 N.Y.2d 791, 406 N.Y.S.2d 33, 377 N.E.2d 477 (1978).

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2. Factors Considered in Ascertaining Parties' Intent

a. Writing

§ 51. Use of contemporaneous writings in construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 601

The general rule of contract construction which provides that instruments executed at substantially the same time, by the same parties, and relating to the same subject matter, are to be read and interpreted together as one instrument, is particularly applicable in the case of real property leases.[1] Where no single writing embodies, nor was intended to embody, the whole of the parties' understanding, the court may examine all the related writings in interpreting the intended effect of a provision in a lease.[2]

A lease and a warranty of land attached thereto and executed simultaneously are to be construed together.[3]

Footnotes

1 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934); Reltron Corp. v. Voxakis Enterprises, Inc., 57 A.D.2d 134, 395 N.Y.S.2d 276 (4th Dep't 1977); Watkins v. Restorative Care Center, Inc., 66 Wash. App. 178, 831 P.2d 1085 (Div. 1 1992), as amended on denial of reconsideration, (June 29, 1992).

2 Rekas v. Dopkavich, 362 Pa. 292, 66 A.2d 230 (1949).

3 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).

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2. Factors Considered in Ascertaining Parties' Intent

b. Other Factors

§ 52. Use of precontract negotiations in construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 600, 601, 603, 606

As a general rule, all precontract negotiations and oral discussions relating to a lease of land are deemed to be merged into, embodied, and superseded by the terms of the executed written lease, and in the absence of fraud or mistake, may not be considered as evidence of the terms and conditions upon which the property was demised.[1] However, if the provisions of a written lease are ambiguous or their meaning is doubtful, preliminary negotiations between the parties preceding the execution of the lease may be considered for the purpose of determining the intention of the parties, although not to vary or contradict the plain terms of the lease.[2] A promise made by the parties prior to the execution of a lease agreement, which contains a merger clause, cannot be used to vary the express terms of the contract.[3]

Footnotes

1 Stein v. Reising, 359 Mo. 804, 224 S.W.2d 80 (1949); Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 N.E.2d 881 (1950); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961).

2 Chicago Auditorium Ass'n v. Corporation of Fine Arts Bldg., 244 Ill. 532, 91 N.E. 665 (1910); Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC, 403 Ill. App. 3d 234, 341 Ill. Dec. 883, 931 N.E.2d 780 (1st Dist. 2010); Fogelson v. Rackfay Const. Co., 300 N.Y. 334, 90 N.E.2d 881 (1950); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985).

3 Jaraysi v. Sebastian, 318 Ga. App. 469, 733 S.E.2d 785 (2012) (disapproved of on other grounds by, George v. Hercules Real Estate Services, Inc., 339 Ga. App. 843, 795 S.E.2d 81 (2016)).

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b. Other Factors

§ 53. Circumstances surrounding execution of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 600

Where controverted language used in the lease is reasonably or fairly susceptible to different constructions, an underlying principle of lease construction is that the presumed intent may be ascertained from the words used in the written instrument interpreted in light of all the facts and circumstances existing at the time the parties entered into the lease.[1] Such facts and circumstances include the subject matter of the lease, the situation of the parties, and the object to be accomplished by the parties,[2] as long as these facts were known to both parties when the lease was made.[3]

Footnotes

1 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981); Colonial Investors, LLC v. Furbush, 175 Conn. App. 154, 167 A.3d 987 (2017), certification denied, 327 Conn. 968, 173 A.3d 953 (2017); Joscar Co. v. Arlen Realty, 54 A.D.2d 541, 387 N.Y.S.2d 117 (1st Dep't 1976); PNP Petroleum I, LP v. Taylor, 438 S.W.3d 723 (Tex. App. San Antonio 2014).

2 Marcelle, Inc., v. Sol & S. Marcus Co., 274 Mass. 469, 175 N.E. 83, 74 A.L.R. 1012 (1931); Ecclesiastes Production Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007).

3 Hatcho Corp. v. Della Pietra, 195 Conn. 18, 485 A.2d 1285 (1985).

Works.

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2. Factors Considered in Ascertaining Parties' Intent

b. Other Factors

§ 54. Parties' subsequent performance or conduct as aid to construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590

If a lease contains ambiguous and uncertain provisions, the court may, in construing it and in ascertaining its true meaning, look to the practical construction or interpretation that the parties, in the performance of the lease, have placed on such provisions.[1] Where it is clear that the parties to a lease have governed their conduct in accordance with a particular construction of the lease, such construction will be given great weight in ascertaining their true intent and should, ordinarily, control the interpretation of the lease by the court.[2]

Caution:

Only in instances where words or phrases of equivocal import have been used in the lease, may the acts and conduct of the parties be considered in construing the lease.[3] In the absence of ambiguity in the provisions of a lease, courts will enforce the instrument in accordance with its plain language, regardless of the construction put upon it by the parties as indicated by their conduct.[4]

Footnotes

[1] Keck v. Brookfield, 2 Ariz. App. 424, 409 P.2d 583 (1965); Gilman v. Nemetz, 203 Cal. App. 2d 81, 21 Cal. Rptr. 317, 94 A.L.R.2d 1332 (2d Dist. 1962); Bishop Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979).

[2] Joscar Co. v. Arlen Realty, 54 A.D.2d 541, 387 N.Y.S.2d 117 (1st Dep't 1976); Earp v. Mid-Continent Petroleum Corp., 1933 OK 412, 167 Okla. 86, 27 P.2d 855, 91 A.L.R. 188 (1933).

[3] Marcelle, Inc., v. Sol & S. Marcus Co., 274 Mass. 469, 175 N.E. 83, 74 A.L.R. 1012 (1931); Bishop Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979); Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985).

[4] Bishop Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979).

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b. Other Factors

§ 55. Use of fairness and reason in construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 595

Where a lease clause is ambiguous and one construction will make the lease unusual or extraordinary and another, equally consistent, would make the contract reasonable, fair, and just, the latter construction will prevail.[1] The court may not redraft an ambiguous lease, but instead must adopt the most reasonable of possible constructions.[2]

Common sense and good faith are the leading touchstones of the construction of a contract, and leases are to be construed so as to avoid an absurd result.[3] A construction should be avoided, if it can be done consistently with the tenor of the agreement, which would be unequal, and the construction which is most obviously just, is to be favored as most in accordance with the presumed intention of the parties.[4]

Footnotes

1 Sears, Roebuck and Co. v. Charwil Associates Ltd. Partnership, 371 Ill. App. 3d 1071, 309 Ill. Dec. 628, 864 N.E.2d 869 (1st Dist. 2007); Georgetown Mfg. and Warehouse Co. v. South Carolina Dept. of Agriculture by Tindal, 301 S.C. 514, 392 S.E.2d 801 (Ct. App. 1990); Trustees of Net Realty Holding Trust v. AVCO Financial Services of Barre, Inc., 147 Vt. 472, 520 A.2d 981 (1986).

2 Foursquare Properties Joint Venture I v. Johnny's Loaf & Stein, Ltd., 116 Wis. 2d 679, 343 N.W.2d 126 (Ct. App. 1983).

3 California Nat. Bank v. Woodbridge Plaza LLC, 164 Cal. App. 4th 137, 78 Cal. Rptr. 3d 561 (4th Dist. 2008); Georgetown Mfg. and Warehouse Co. v. South Carolina Dept. of Agriculture by Tindal, 301 S.C. 514, 392 S.E.2d 801

(Ct. App. 1990).

[4] Kutkowski v. Princeville Prince Golf Course, LLC, 129 Haw. 350, 300 P.3d 1009 (2013); Atlantic Discount Corp. v. Mangel's of North Carolina, Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

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§ 56. Evidence of custom and usage in construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 591

Where a lease is ambiguous, evidence of custom and usage is admissible to aid in the interpretation of the language.[1] However, a local custom may not be considered as evidence of the parties' intent where the written lease, in express terms, provides against the right claimed by the custom.[2] Evidence of custom or usage may not be used to vary the obligations of a written instrument which is complete and unambiguous.[3]

Footnotes

1 In re Estate of Fike, 385 Pa. Super. 627, 561 A.2d 1268 (1989); Miller v. Gray, 136 Tex. 196, 149 S.W.2d 582, 141 A.L.R. 1237 (1941).

2 Miller v. Gray, 136 Tex. 196, 149 S.W.2d 582, 141 A.L.R. 1237 (1941).

3 May v. American Trust Co., 135 Cal. App. 385, 27 P.2d 101 (3d Dist. 1933); Huber v. Kerrick, 251 Ky. 439, 65 S.W.2d 449 (1933); Bowles v. Brown, 1940 OK 255, 187 Okla. 264, 102 P.2d 837 (1940); Miller v. Gray, 136 Tex. 196, 149 S.W.2d 582, 141 A.L.R. 1237 (1941).

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§ 57. Use of applicable law in construction of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 592

The rule that the existing statutes at the time a contract is made become a part of the contract and must be read into it except where the contract discloses a contrary intention,[1] has been applied by courts in ascertaining the intention of the parties to a lease.[2] Provisions in a lease evidently prepared by an expert may be presumed to have been drawn with knowledge of the pertinent judicial decisions when the intent of the parties to the lease is at issue.[3]

Footnotes

1 Am. Jur. 2d, Contracts § 363.

2 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).

3 Sutcliffe v. Pawtucket Amusement Co., 51 R.I. 493, 155 A. 578, 77 A.L.R. 833 (1931).

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3. Covenants and Conditions

a. In General

§ 58. Covenants and conditions in lease, generally; definitions and distinctions

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1000 to 1011, 1013, 1018(1), 1018(2)

A covenant, as that term is generally used with reference to a lease, imports an agreement that an act is already performed or will be performed in the future.[1] Leases commonly include a multitude of covenants which the lessee agrees to perform.[2] Such covenants include covenants to repair.[3]

A lease may also include covenants which the landlord agrees to perform, such as the covenant to refund a tenant's security deposit,[4] and the covenant not to use or lease land to be used in competition with the business of the tenant.[5]

A leasehold estate, like other estates, may also be granted subject to a condition. A leasehold estate on condition is one with a qualification annexed by which it may be destroyed upon the happening of a particular event.[6]

A lessee who agrees to the lease conditions requested by the owner of private property cannot thereafter compel performance of the lease agreement by the private owner while the lessee refuses to perform the agreed conditions.[7] The primary distinction between a covenant and condition pertains to the remedy in case of a breach; the breach of a condition upon which a leasehold estate is granted results in automatic termination or forfeiture of the estate, whereas the breach of a covenant does not automatically terminate the estate, but instead subjects the breaching party to liability for monetary damages in an action at law[8] or, in extraordinary circumstances, the remedy of a conditional decree of cancellation.[9]

The determination of whether a particular clause or provision of a lease creates a covenant or condition depends upon the intention of the parties as disclosed by the language used[10] and, in the case of ambiguous language, by the subject matter of the lease and the surrounding circumstances.[11] Also of importance in determining whether a provision in a lease is a covenant or a condition is the rule that in doubtful cases a court should favor the construction of a covenant rather than a condition, since the breach of a condition may destroy the estate and is, thus, viewed with disfavor by the courts.[12]

Footnotes

1 Housing Authority of City of Mansfield v. Rovig, 676 S.W.2d 314 (Mo. Ct. App. S.D. 1984).

2 Mitchell v. Lovato, 1982-NMSC-018, 97 N.M. 425, 640 P.2d 925 (1982).

3 §§ 455 to 464, 669 to 672.

4 Mullendore Theatres, Inc. v. Growth Realty Investors Co., 39 Wash. App. 64, 691 P.2d 970 (Div. 2 1984).

5 §§ 65 to 68.

6 Housing Authority of City of Mansfield v. Rovig, 676 S.W.2d 314 (Mo. Ct. App. S.D. 1984).

7 Sprint Spectrum L.P. v. Mills, 283 F.3d 404 (2d Cir. 2002).

8 Housing Authority of City of Mansfield v. Rovig, 676 S.W.2d 314 (Mo. Ct. App. S.D. 1984); Parten v. Cannon, 829 S.W.2d 327 (Tex. App. Waco 1992), writ denied, (Sept. 16, 1992).

9 Parten v. Cannon, 829 S.W.2d 327 (Tex. App. Waco 1992), writ denied, (Sept. 16, 1992).

10 SGM Partnership v. Nelson, 5 Haw. App. 526, 705 P.2d 49 (1985).

11 Housing Authority of City of Mansfield v. Rovig, 676 S.W.2d 314 (Mo. Ct. App. S.D. 1984).

12 § 61.

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§ 59. Creation of covenant or condition in lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1000, 1002, 1013, 1018(1), 1018(2)

A valid covenant in a lease may be created in the same way that any other binding contract may be created.[1] Precise technical words are not essential to the creation of either a covenant or a condition in a lease.[2] However, there is authority holding that words such as "on condition that," "if," and "provided," are words of condition, and in the absence of an indication to the contrary, the employment of such words in a contract will create a condition precedent rather than a covenant.[3] On the other hand, it has been held that where the lease contains no express words of defeasance, forfeiture, or reversion, the words employed will be construed as creating a covenant.[4]

Footnotes

1 Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 10, 11.

2 Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989); Markey v. Smith, 301 Mass. 64, 16 N.E.2d 20, 118 A.L.R. 274 (1938).

3 Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

4 Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

Works.

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§ 60. Condition in lease as subsequent or precedent

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606

Conditions in a lease may be either precedent or subsequent. While it is not always easy to determine whether the condition created by the terms of a conveyance is precedent or subsequent, the general rule is that, if the act or condition required does not necessarily precede the vesting of the estate but may be performed after the estate vests, then the condition is subsequent.[1] By contrast, a condition precedent must be performed before the contract becomes absolute and obligatory upon the party benefiting from the performance.[2] Where a lessee has a right to extend or renew the lease provided the lessee gives the lessor notice by a specified time that the lessee intends to exercise that right, the giving of notice is a condition precedent.[3]

The distinction between a condition precedent and a condition subsequent in the context of leases becomes most relevant when a failure to comply with the particular condition is alleged and a remedy is sought; the remedy for the failure to comply with a condition precedent is a forfeiture of the lease, whereas the failure to comply with a condition subsequent may be remedied by an action for damages.[4] In this connection, it has been observed that the law prefers conditions subsequent in leases since breaches thereof are remediable by damages rather than by forfeiture of the lease.[5]

Footnotes

1 Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

2 Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

3 In re Royal Yarn Dyeing Corp., 114 B.R. 852 (Bankr. E.D. N.Y. 1990); Trollen v. City of Wabasha, 287 N.W.2d 645

(Minn. 1979).

[4] § 79.

[5] Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

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a. In General

§ 61. Rules of construction of covenants and conditions in leases

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1000, 1002, 1013, 1018(1), (2)

Where it is doubtful whether words in a lease create a promise or an express condition, they will be interpreted as creating a promise or covenant.[1] An obligation in a lease generally will be construed as a covenant unless a conditional estate is clearly and unequivocably revealed by the language of the lease.[2] This is because interpreting an obligation in a lease as a condition could lead to the total defeat or forfeiture of the contract of lease,[3] which is disfavored in the law.[4]

A covenant in a lease restricting the lessee's use of the premises will be construed narrowly, in favor of unrestricted use, in the absence of proof to the effect that the restriction on use of the premises was a consideration or inducement for execution of the lease, or in the absence of clear and unambiguous language in the lease indicating an express restriction.[5]

Footnotes

1 SGM Partnership v. Nelson, 5 Haw. App. 526, 705 P.2d 49 (1985); Housing Authority of City of Mansfield v. Rovig, 676 S.W.2d 314 (Mo. Ct. App. S.D. 1984).

2 Buffalo Ins. Co. of City of Buffalo, N.Y. v. Bommarito, 42 F.2d 53, 70 A.L.R. 1211 (C.C.A. 8th Cir. 1930); Darling Shop of Birmingham v. Nelson Realty Co., 255 Ala. 586, 52 So. 2d 211 (1951); Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989); Parten v. Cannon, 829 S.W.2d 327 (Tex. App. Waco 1992), writ denied, (Sept. 16, 1992).

3 Buffalo Ins. Co. of City of Buffalo, N.Y. v. Bommarito, 42 F.2d 53, 70 A.L.R. 1211 (C.C.A. 8th Cir. 1930).

[4] § 79.

[5] Chassereau v. Stuckey, 288 S.C. 368, 342 S.E.2d 623, 86 A.L.R.4th 255 (Ct. App. 1986).

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b. Implied Covenants

§ 62. Implied covenants in leases, generally; doctrine of necessary implication

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1018(1), 1018(2), 1083

The doctrine of necessary implication is a principle of contract law applicable in construing a lease which operates, generally, to imply an agreement by the parties to perform those things that, according to reason and justice, they should do in order to carry out the purpose of the contract, and to refrain from doing anything that would destroy or injure the right to receive the fruits of the contract.[1] Implied-in-fact covenants are not favored in the law,[2] and it is well-established that a covenant may be implied in a lease only where it arises from language used in the lease or is indispensable to carry out the intent of the parties or the purpose of the lease.[3] Some courts have expressly imposed the additional requirements that a covenant may be implied in a lease only if (1) it appears from the language used that the covenant was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, (2) the covenant is justified on the ground of legal necessity, and (3) it can be rightfully assumed that the covenant would have been made if attention had been called to it.[4] An omission to specify an agreement in a written lease is evidence that there was no such understanding, and covenants will not be extended by implication unless the implication is clear and undoubted.[5]

Covenants which might and ought to have been expressed in a lease if intended, will not be implied.[6] An implied covenant in a lease cannot rest solely upon an inference drawn from the facts surrounding the execution of the lease, but must have a basis in the contract itself.[7] In addition, where the subject at issue is completely covered[8] or clearly delineated[9] by the lease document itself, a covenant dealing with that subject will not be implied. An express covenant on a given subject matter excludes the possibility of an implied covenant with a different and contradictory nature.[10]

Footnotes

[1] Slater v. Pearle Vision Center, Inc., 376 Pa. Super. 580, 546 A.2d 676 (1988).

[2] Casa D'Angelo, Inc. v. A & R Realty Co., 553 N.E.2d 515 (Ind. Ct. App. 1990); Fay's Drug Co., Inc. v. Geneva Plaza Associates, 98 A.D.2d 978, 470 N.Y.S.2d 240 (4th Dep't 1983), order aff'd, 62 N.Y.2d 886, 478 N.Y.S.2d 867, 467 N.E.2d 531 (1984); Downtown Associates, Ltd. v. Burrows Bros. Co., 34 Ohio App. 3d 296, 518 N.E.2d 564 (8th Dist. Cuyahoga County 1986).

[3] § 63.

[4] First American Bank & Trust Co. v. Safeway Stores, Inc., 151 Ariz. 584, 729 P.2d 938 (Ct. App. Div. 2 1986); Turman v. Safeway Stores, Inc., 132 Mont. 273, 317 P.2d 302 (1957); Downtown Associates, Ltd. v. Burrows Bros. Co., 34 Ohio App. 3d 296, 518 N.E.2d 564 (8th Dist. Cuyahoga County 1986).

[5] Sherman v. Clear Channel Outdoor, Inc., 889 F. Supp. 2d 168 (D. Mass. 2012) (applying Massachusetts law).

[6] Solomon v. Neisner Bros., 93 F. Supp. 310 (M.D. Pa. 1950), judgment aff'd, 187 F.2d 735 (3d Cir. 1951).

[7] Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1, 22 A.L.R.2d 1460 (1951).

[8] First American Bank & Trust Co. v. Safeway Stores, Inc., 151 Ariz. 584, 729 P.2d 938 (Ct. App. Div. 2 1986); Cordonier v. Central Shopping Plaza Associates, 82 Cal. App. 3d 991, 147 Cal. Rptr. 558 (2d Dist. 1978).

[9] Downtown Associates, Ltd. v. Burrows Bros. Co., 34 Ohio App. 3d 296, 518 N.E.2d 564 (8th Dist. Cuyahoga County 1986).

[10] Mercury Inv. Co. v. F.W. Woolworth Co., 1985 OK 38, 706 P.2d 523 (Okla. 1985); Woodland Theatres, Inc. v. ABC Intermountain Theatres, Inc., 560 P.2d 700 (Utah 1977).

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b. Implied Covenants

§ 63. Requirement that subject of covenant go to essence of lease

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1000, 1002, 1013, 1018(1), (2)

A covenant may be implied in a lease only where it arises from language used in the lease or is indispensable to carry out the intent of the parties or the purpose of the lease.[1] In order to be implied into a lease, a covenant must go to the essence of the letting.[2] A covenant of title will also be implied in a lease, if not expressed;[3] if the lessee denies title in the lessor, this covenant has been breached.[4] In addition, in every agreement, including a lease, there is an implied covenant of good faith and fair dealing pursuant to which neither party may do anything that will injure the rights or interests of another party to the agreement.[5]

Footnotes

1 Casa D'Angelo, Inc. v. A & R Realty Co., 553 N.E.2d 515 (Ind. Ct. App. 1990); Ultimate Computer Services, Inc. v. Biltmore Realty Co., Inc., 183 N.J. Super. 144, 443 A.2d 723, 30 A.L.R.4th 963 (App. Div. 1982); Downtown Associates, Ltd. v. Burrows Bros. Co., 34 Ohio App. 3d 296, 518 N.E.2d 564 (8th Dist. Cuyahoga County 1986).

2 Kane v. New Hampshire State Liquor Commission, 118 N.H. 706, 393 A.2d 555 (1978).

3 §§ 469 to 472.

4 Solomon v. Neisner Bros., 93 F. Supp. 310 (M.D. Pa. 1950), judgment aff'd, 187 F.2d 735 (3d Cir. 1951).

5 Tucson Medical Center v. Zoslow, 147 Ariz. 612, 712 P.2d 459 (Ct. App. Div. 2 1985); Ocean Services Corp. v. Ventura Port Dist., 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750 (2d Dist. 1993), as modified on denial of reh'g, (June

23, 1993); Macadam Bay Homeowners Association v. Soyster, 285 Or. App. 841, 397 P.3d 587 (2017).

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§ 64. Commercial leases; implied covenant of continuous operation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1000, 1002, 1013, 1018(1), (2)

Pursuant to the doctrine of necessary implication, there is an implied covenant by the landlord in a commercial lease situation that the premises will be suitable for their intended commercial purpose.[1] This means that at the inception of the lease, there is an implied warranty that there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that the essential facilities will remain in a suitable condition.[2] In addition, with regard to a commercial lease, it has been held that a component of the implied good faith and fair dealing covenant going to the essence of the agreement, is the duty on the part of a landlord to promote the continued use and occupancy of the premises by the existing tenant.[3]

In turn, in cases involving commercial leases which, in addition to a certain minimum or fixed-base rental, obligate the business-lessee to pay a significant part of the rental in the form of a percentage of the lessee's gross receipts, which can only be collected if the business is operating on the premises, a covenant of continuous use and operation on the part of the lessee will be implied.[4] The inadequacy of the base rent implies a covenant of continuous operation.[5] However, absent evidence that the minimum or base rental is insignificant, courts generally will not imply a covenant to continue diligent operation of the business, the rationale being that where the base rent is substantial, the lack of a substantial percentage rental will not defeat the purpose of the lease.[6]

In this connection, it has been held that the base rent is inadequate, thereby implying a covenant of continuous operation, where it is not equal to the fair rental value of the premises,[7] or where it is substantially below the market value at the time the lease was signed.[8]

Footnotes

[1] Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373, 76 A.L.R.4th 919 (Tex. 1988).

[2] Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373, 76 A.L.R.4th 919 (Tex. 1988).

[3] Ocean Services Corp. v. Ventura Port Dist., 15 Cal. App. 4th 1762, 19 Cal. Rptr. 2d 750 (2d Dist. 1993), as modified on denial of reh'g, (June 23, 1993).

[4] EMRO Marketing Co. v. Plemmons, 855 F.2d 528 (8th Cir. 1988); Evans v. Grand Union Co., 759 F. Supp. 818 (M.D. Ga. 1990); First American Bank & Trust Co. v. Safeway Stores, Inc., 151 Ariz. 584, 729 P.2d 938 (Ct. App. Div. 2 1986).

[5] Casa D'Angelo, Inc. v. A & R Realty Co., 553 N.E.2d 515 (Ind. Ct. App. 1990).

[6] Bobenal Investment, Inc. v. Giant Super Markets, Inc., 79 Mich. App. 31, 260 N.W.2d 915 (1977).

[7] First American Bank & Trust Co. v. Safeway Stores, Inc., 151 Ariz. 584, 729 P.2d 938 (Ct. App. Div. 2 1986).

[8] Worcester-Tatnuck Square CVS, Inc. v. Kaplan, 33 Mass. App. Ct. 499, 601 N.E.2d 485 (1992).

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c. Restrictive Noncompetition Covenants

§ 65. Express noncompetition covenants; shopping center leases

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1001 to 1003, 1012, 1013, 1015(3), 1048, 1083

A.L.R. Library

Shopping center lease restrictions on type of business conducted by tenant, 1 A.L.R.4th 942

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

In the case of a lease of property to a business-lessee, the lessor may expressly stipulate in the lease that the lessor will not use other premises controlled or owned by the lessor to compete with the lessee, or will not lease such premises to others, or permit the use of such premises by others, in competition with the lessee.[1] Such restrictive noncompetition covenants are frequently inserted in shopping center leases, and are generally of two types: those restricting the "types" of businesses which may be operated on the lessor's other premises; and those restricting the sale of either designated items or designated classes of items on the lessor's premises.[2] A restrictive covenant prohibiting the landlord to use, or permit to be used, any other of the landlord's property to conduct a business in competition with the tenant's, is designed to insulate or protect the tenant against financial or business hazard for the duration of the lease, to the extent that such protection can be provided by the landlord.[3]

Although there is authority holding that such covenants in leases are disfavored as restraints on the free marketability of land,[4] it is well established that such covenants relating to land use are enforceable.[5] Restrictive covenants in leases prohibiting the landlord from using or permitting to be used other property owned or controlled by the landlord to conduct a

business in competition with the tenant, have been upheld against attack on the grounds that they are unreasonable;[6] that they violate antitrust statutes;[7] and that they are an unlawful restraint of trade.[8]

Restrictive covenants in commercial leases, which contain a radius restriction prohibiting the lessee from operating a competing facility within a nearby geographic area, are enforceable.[9]

Footnotes

1 Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); AAA Valley Gravel, Inc. v. Totaro, 325 P.3d 529 (Alaska 2014); Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882 (Minn. 1978); City Products Corp. v. Berman, 610 S.W.2d 446 (Tex. 1980).

2 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981); Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); City Products Corp. v. Berman, 610 S.W.2d 446 (Tex. 1980).
Household supplies that were included in the definition of "groceries," as used in "grocery exclusive" provisions in the grocery store owner and operator's shopping center leases, included only nonfood items associated with preparation and service of food and with maintenance of a clean kitchen, such as soap, matches, and paper napkins. Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 2018 WL 626799 (11th Cir. 2018) (applying Florida law).

3 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981); Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882 (Minn. 1978); Cragmere Holding Corp. v. Socony-Mobil Oil Co., 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961).

4 American Nat. Bank and Trust Co. of Chicago v. Tufano, 222 Ill. App. 3d 778, 165 Ill. Dec. 221, 584 N.E.2d 400 (1st Dist. 1991).

5 Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); Pay 'N Pak Stores, Inc. v. Superior Court, 210 Cal. App. 3d 1404, 258 Cal. Rptr. 816 (6th Dist. 1989); Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 413 A.2d 1226 (1979); Reed v. O. A. & E., Inc., 390 So. 2d 487 (Fla. 4th DCA 1980); Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882 (Minn. 1978); Vermont Nat. Bank v. Chittenden Trust Co., 143 Vt. 257, 465 A.2d 284 (1983).

6 Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 413 A.2d 1226 (1979).

7 Goldberg v. Tri-States Theatre Corporation, 126 F.2d 26 (C.C.A. 8th Cir. 1942); Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 413 A.2d 1226 (1979).

8 Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1, 22 A.L.R.2d 1460 (1951); Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 413 A.2d 1226 (1979); Cragmere Holding Corp. v. Socony-Mobil Oil Co., 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961).

9 Dave & Buster's, Inc. v. White Flint Mall, LLLP, 616 Fed. Appx. 552 (4th Cir. 2015) (applying Maryland law); Fab'rik Boutique, Inc. v. Shops Around Lenox, Inc., 329 Ga. App. 21, 763 S.E.2d 492 (2014).

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A.L.R. Library

Construction and operation of parking-space provision in shopping-center lease, 56 A.L.R.3d 596

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

In construing restrictive covenants prohibiting a lessor from leasing other premises to the same or similar business as that operated by a lessee, the court must attempt to give effect to the party's intent[1] at the time the contract is entered into;[2] such intent must be gathered, if possible, from the language of the covenant.[3] Where the restrictive covenant is unambiguous and clear on its face, the intended purpose of the covenant may be ascertained only from the text of the covenant.[4]

In ascertaining the parties' intent with regard to a restrictive covenant which contains an ambiguity, the process of construction will involve consideration of the subject matter of the covenant, the objects and purposes to be accomplished by the covenant, the surrounding circumstances, as well as the meaning of the language used.[5] The restrictive covenant will be construed in light of an examination of the whole lease and not from a particular clause alone.[6]

Additionally, although express covenants or agreements by a lessor not to lease other property for the purpose of conducting a business in competition with a tenant have been held legal and valid,[7] there is authority holding that such a covenant, being

in restraint of trade, must be strictly construed;[8] thus, any ambiguity will be resolved against the party benefiting from the restrictions[9] or seeking its enforcement,[10] and in favor of unrestricted[11] or free use of the land.[12] Restrictive covenants in leases, such as use clauses, are strictly construed against those seeking to enforce them and where there are two equally plausible interpretations of a restrictive covenant, the less restrictive interpretation will be adopted.[13] Radius restrictions in commercial lease agreements that prohibit the opening of another store or business by the tenant within a certain radius of the leased premises are in the nature of restrictions on trade and competition, which are to be narrowly construed.[14]

Footnotes

1 Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882 (Minn. 1978).

2 J.C. Penney Co., Inc. v. Giant Eagle, Inc., 813 F. Supp. 360 (W.D. Pa. 1992), judgment aff'd, 995 F.2d 217 (3d Cir. 1993).

3 Storwal Intern., Inc. v. Thom Rock Realty Co., L.P., 768 F. Supp. 429 (S.D. N.Y. 1991); Addison County Automotive, Inc. v. Church, 144 Vt. 553, 481 A.2d 402 (1984).

4 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981).

5 Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc., 266 N.W.2d 882 (Minn. 1978).

6 Storwal Intern., Inc. v. Thom Rock Realty Co., L.P., 768 F. Supp. 429 (S.D. N.Y. 1991).

7 § 65.

8 Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); In re Chestnut Ridge Plaza Associates, L.P., 156 B.R. 477 (Bankr. W.D. Pa. 1993); Pay 'N Pak Stores, Inc. v. Superior Court, 210 Cal. App. 3d 1404, 258 Cal. Rptr. 816 (6th Dist. 1989); Reed v. O. A. & E., Inc., 390 So. 2d 487 (Fla. 4th DCA 1980); American Nat. Bank and Trust Co. of Chicago v. Tufano, 222 Ill. App. 3d 778, 165 Ill. Dec. 221, 584 N.E.2d 400 (1st Dist. 1991); Diamond Point Plaza Ltd. Partnership v. Wells Fargo Bank, N.A., 400 Md. 718, 929 A.2d 932 (2007).

9 J.C. Penney Co., Inc. v. Giant Eagle, Inc., 813 F. Supp. 360 (W.D. Pa. 1992), judgment aff'd, 995 F.2d 217 (3d Cir. 1993).

10 Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991); St. Louis Union Trust Co. v. Tipton Elec. Co., 636 S.W.2d 357 (Mo. Ct. App. E.D. 1982); Berkeley Development Co. v. Great Atlantic & Pacific Tea Co., 214 N.J. Super. 227, 518 A.2d 790 (Law Div. 1986); Foods First, Inc. v. Gables Associates, 244 Va. 180, 418 S.E.2d 888 (1992); Dart Drug Corp. v. Nicholakos, 221 Va. 989, 277 S.E.2d 155 (1981).

11 Almacs Inc. v. Drogin, 771 F. Supp. 506 (D.R.I. 1991).

12 Dart Drug Corp. v. Nicholakos, 221 Va. 989, 277 S.E.2d 155 (1981).

13 Fratelli's Pizza and Restaurant Corp. v. Kayzee Realty Corp., 74 A.D.3d 481, 902 N.Y.S.2d 534 (1st Dep't 2010).

14 Diamond Point Plaza Ltd. Partnership v. Wells Fargo Bank, N.A., 400 Md. 718, 929 A.2d 932 (2007).

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c. Restrictive Noncompetition Covenants

§ 67. Implied noncompetition covenants in leases; effect of grant of exclusive mercantile rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1018(1), 1018(2), 1083

A.L.R. Library

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

Implied covenant in lease for business purposes, that lessor will not compete in business activity for conducting of which lessee leased the premises, 22 A.L.R.2d 1466

Language in a lease granting the lessee an exclusive privilege to carry on a particular business on the landlord's property has been held to create an implied covenant on the part of the landlord not to use, and not to permit the use of, other property owned or controlled by the lessor within the restricted area in competition with the lessee.[1] A provision in a lease granting the lessee exclusive mercantile rights is valid and enforceable against the lessor; such a covenant may be viewed as consideration for the lessee's faithful performance of the lease.[2] Concomitant with such a covenant is the implied obligation of the lessor not to cancel the covenant or derogate from its force by so using the lessor's adjoining property as substantially to impair the lessee's enjoyment of the leased premises.[3]

However, in the absence of express language in the lease indicating an intention to grant an exclusive privilege to carry on the particular business contemplated, the lessor undertakes no implied obligation not to compete with the tenant, or not to permit other property owned by the lessor to be used for such competition.[4]

Footnotes

[1] Keating v. Preston, 42 Cal. App. 2d 110, 108 P.2d 479 (3d Dist. 1940); Daitch Crystal Dairies, Inc. v. Neisloss, 8 A.D.2d 965, 190 N.Y.S.2d 737 (2d Dep't 1959), judgment aff'd, 8 N.Y.2d 723, 201 N.Y.S.2d 101, 167 N.E.2d 643 (1960).

[2] Carter v. Adler, 138 Cal. App. 2d 63, 291 P.2d 111 (2d Dist. 1955).

[3] Carter v. Adler, 138 Cal. App. 2d 63, 291 P.2d 111 (2d Dist. 1955); Parker v. Lewis Grocer Co., 246 Miss. 873, 153 So. 2d 261 (1963).

[4] Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1, 22 A.L.R.2d 1460 (1951); Reed v. O. A. & E., Inc., 390 So. 2d 487 (Fla. 4th DCA 1980).

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§ 68. Application of restrictive noncompetition covenant to after-acquired property

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1001, 1013, 1083

A.L.R. Library

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

A restrictive covenant stipulating that the landlord will neither use nor permit the landlord's land to be used to compete with the tenant's business may be properly applied to property acquired by the lessor after the execution of the lease, and need not be strictly limited to that land which the lessor owned when it entered into the lease.[1] The rationale is that if the covenant's reach was limited to only those lands owned by the landlord when the lease was signed, the protection afforded to the tenants would be so minimal as to be illusory and, therefore, not consonant with the essential purpose of the covenant; the landlord may not avoid the landlord's obligation by making the landlord's purchase of land within the restricted area after the lease is signed.[2]

Footnotes

[1] Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981); Edmond's of

Fresno v. MacDonald Group, Ltd., 171 Cal. App. 3d 598, 217 Cal. Rptr. 375 (5th Dist. 1985); Cragmere Holding Corp. v. Socony-Mobil Oil Co., 65 N.J. Super. 322, 167 A.2d 825 (App. Div. 1961).

[2] Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981).

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4. Modification of Lease

§ 69. Modification of lease, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 593, 594, 596, 598, 608, 611

As in the case of contracts, generally,[1] provisions in a lease may be modified, discharged, or replaced by a subsequent agreement, and this, generally speaking, can result only from an agreement between the parties.[2] Typically, legitimate lease modifications will include provisions reducing rent, or surrendering unexpired terms. In determining whether a new agreement constitutes a new lease or a modification of an existing lease, substance, rather than form, controls; a subsequent agreement, in order to be a modification and deemed part of a single contract, must do more than label itself an amendment or incorporate terms and provisions from the earlier agreement but, rather, it must alter original terms and provisions in the first agreement.[3]

Where a lease is subsequently modified, the lease and the modification must be taken together and construed as one contract in order to effect the intention of the parties.[4]

Footnotes

1 Am. Jur. 2d, Contracts §§ 496 to 506.

2 Hess v. Dumouchel Paper Co., 154 Conn. 343, 225 A.2d 797 (1966); Hildebrandt v. Newell, 199 Minn. 319, 272 N.W. 257 (1937); Willeke v. Bailey, 144 Tex. 157, 189 S.W.2d 477 (1945).

3 In re S.E. Nichols Inc., 120 B.R. 745 (Bankr. S.D. N.Y. 1990).

4 In re New York Skyline, Inc., 432 B.R. 66 (Bankr. S.D. N.Y. 2010).

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4. Modification of Lease

§ 70. Modification by second lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 608

A lease may be modified by a second lease where the latter is not so inconsistent and incompatible with the first lease as to render it void.[1] However, there is authority holding that where the terms of a leasing agreement are so inconsistent with those of a later one that the two cannot subsist together, the one made first is conclusively presumed to have been superseded by the other.[2] A second lease is the controlling document with regard to who is responsible for paying rent and who is otherwise bound under it, where the lease contains a merger clause and there is no allegation of fraud or mistake that could justify reforming the agreement.[3]

Footnotes

1 Stedman v. Hill, 195 Md. 568, 74 A.2d 41 (1950).

2 Willeke v. Bailey, 144 Tex. 157, 189 S.W.2d 477 (1945).

3 Pannell v. Shannon, 425 S.W.3d 58 (Ky. 2014).

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4. Modification of Lease

§ 71. Oral modification of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 593, 594, 596, 598, 608, 611

Generally, provisions in a written lease may be modified by a subsequent parol agreement without violating the parol evidence rule.[1] A subsequent verbal agreement on the part of the lessor to make alterations or repairs, if based on a sufficient consideration, is valid and enforceable.[2] However, where a lease provides that it cannot be changed, modified, or amended unless such change, modification, or amendment is in writing and executed by the party against whom enforcement of the change, modification, or amendment is sought, alleged modification by oral agreement of the parties will not be given effect.[3] In this situation, the tenant's failure to object to the lessor's violation of a particular provision in a lease will not be deemed to be consent to the alleged oral modification or amendment of the lease.[4]

Footnotes

1 Hess v. Dumouchel Paper Co., 154 Conn. 343, 225 A.2d 797 (1966).
As to modification of written contracts by parol, generally, see Am. Jur. 2d, Contracts § 502.

2 §§ 455, 465.

3 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981); 130 Remsen LLC v. Commercial Investigations LLC, 57 Misc. 3d 678, 59 N.Y.S.3d 880 (N.Y. City Ct. 2017).
Written lease with no early termination provision was not modified by alleged oral agreement to allow early termination. Gay St. Polaris, L.L.C. v. Polaris Pediatrics, Inc., 2016-Ohio-7576, 2016 WL 6462394 (Ohio Ct. App. 10th Dist. Franklin County 2016).

4 Valley Properties, Inc. v. King's Dept. Stores of Tewksbury, Inc., 505 F. Supp. 92 (D. Mass. 1981).

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4. Modification of Lease

§ 72. Consideration for modification of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 593, 608

As is the case with all new agreements which modify existing obligatory contracts,[1] consideration of some sort is necessary to support any promise by either the landlord or the tenant which substantially modifies the terms of the existing tenancy, where the modified agreement has not been executed.[2] However, there is authority to the effect that no consideration is necessary to support an agreement reducing the rent where the agreement has already been fully executed, that is, where the reduced rent has been accepted as payment in full.[3]

Footnotes

1 Am. Jur. 2d, Contracts §§ 500, 501.

2 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934); Dupree v. Boniuk Interests, Ltd., 472 S.W.3d 355 (Tex. App. Houston 1st Dist. 2015); Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P., 255 S.W.3d 807 (Tex. App. Dallas 2008).

3 § 538.

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4. Modification of Lease

§ 73. Consideration for modification of lease—Performance of existing obligation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 590, 593, 608

It is a general rule that the performance of a legal duty or existing obligation is not a sufficient consideration to support a promise.[1] However, there is authority to the effect that under some circumstances, performance of the obligations under a lease is sufficient consideration for an agreement in modification or substitution of the original lease; where nonperformance of the obligations of a lease is threatened and a new promise is made to perform such obligations provided the other party promises something additional, performance of the original obligation is sufficient consideration for the modified or substituted agreement.[2] This rule has been applied where extraordinary circumstances have arisen making performance more onerous or less advantageous than expected.[3]

Footnotes

1 Am. Jur. 2d, Contracts § 135.

2 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).

3 Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 252 N.W. 650, 93 A.L.R. 1393 (1934).

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5. Breach of Provisions of Lease; Enforcement and Remedies

a. In General

§ 74. Limitation of liability, or remedy, in event of breach of lease, by parties' agreement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 994, 995, 1031(1), 1031(2)

Where the parties to a lease have limited their remedies under the lease, the agreement will control in the event of a breach.[1] If a lease contract specifically provides for only one remedy and denominates that this is the only remedy, the lessor is bound by the exclusive remedy set out in the contract in the event of a breach by the lessee.[2]

Similarly, a lessee may limit the lessee's potential liability for breach of the lease.[3] Where the lease has a damage or indemnity covenant which takes effect upon termination or breach of the lease, the lessor's damages must be calculated in accordance with those provisions.[4]

Footnotes

1 Matter of Continental Airlines, Inc., 146 B.R. 520 (Bankr. D. Del. 1992); White/Reach Brannon RD., LLC v. Rite Aid of Kentucky, Inc., 488 S.W.3d 631 (Ky. Ct. App. 2016).

2 Bifano v. Young, 665 S.W.2d 536 (Tex. App. Corpus Christi 1983), writ refused n.r.e., (Mar. 28, 1984).

3 Trustees of Girard's Estate v. Bankers Securities Corp., 425 Pa. 495, 229 A.2d 893 (1967).

4 In re Goldblatt Bros., Inc., 66 B.R. 337 (Bankr. N.D. Ill. 1986).

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5. Breach of Provisions of Lease; Enforcement and Remedies

a. In General

§ 75. Who is proper party to action for breach of lease, generally; successors in interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1020, 1021, 1024, 1027

A nonparty normally lacks standing to challenge noncompliance with a lawful lease.[1] However, a successor in interest to an original party to the lease may maintain a suit upon the lease, if the successor in interest proves that successor in interest is the real party in interest, that is, the owner of the right being enforced and the one in the position to discharge the defendant from the liability being sued upon.[2]

A party who signs a lease but is not mentioned in the lease as a tenant or other party to the lease, is not liable as a principal party to the lease, pursuant to the general rule of contract construction which provides that when the body of a contract purports to set out the names of the parties thereto, and a person not named in the body of the contract signs the contract, and nothing in the contract indicates that such person signed as a party, then such person is not bound as a party to the contract and is not liable thereunder.[3] However, an original lessee remains liable under the lease notwithstanding its assignment to others and, thus, is a proper and necessary party to an action by the lessor for damages for breach of the lease.[4]

Footnotes

1 National Jockey Club v. Ganassi, 740 F. Supp. 2d 950 (N.D. Ill. 2010); U.S. v. Village of New Hempstead, N.Y., 832 F. Supp. 76 (S.D. N.Y. 1993); In re Barnhill's Buffet, Inc., 397 B.R. 51 (Bankr. M.D. Tenn. 2008), order aff'd, 421 B.R. 602 (B.A.P. 6th Cir. 2009) (applying Mississippi law); Bernals, Inc. v. Kessler-Greystone, LLC, 70 So. 3d 315 (Ala. 2011).

2 L. R. Property Management, Inc. v. Grebe, 1981-NMSC-035, 96 N.M. 22, 627 P.2d 864 (1981).

[3] In re Dickerson's Estate, 600 S.W.2d 714 (Tenn. 1980).

[4] Peiser v. Mettler, 50 Cal. 2d 594, 328 P.2d 953, 74 A.L.R.2d 1 (1958).

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a. In General

§ 76. Anticipatory breach of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 595, 1006

A lease agreement may be anticipatorily breached where one party, after partial performance, unconditionally repudiates liability for further performance; under such circumstances, the injured party has the present right to file suit to receive in damages the present value of all that the injured party would have received had the contract been performed.[1] An anticipatory breach of a lease by the lessee occurs when the lessee, as a party to an executory contract, manifests a definite and unequivocal intent prior to the time fixed in the contract that it will not render its performance under the contract when that time arrives.[2] There must be an absolute and unequivocal refusal to perform or a definite and positive statement of an inability to fulfill one's obligations under the lease; the fact that a party seeks to preserve what it deems to be a legal defense to the required performance does not reflect an intention to deliberately breach the agreement.[3]

Footnotes

[1] Hawkinson v. Johnston, 122 F.2d 724, 137 A.L.R. 420 (C.C.A. 8th Cir. 1941); Curran v. Smith-Zollinger Co., 18 Del. Ch. 220, 157 A. 432 (1931); Teeter v. Mid-West Enterprise Co., 1935 OK 1174, 174 Okla. 644, 52 P.2d 810 (1935); Hoppenstein Properties, Inc. v. McLennan County Appraisal Dist., 341 S.W.3d 16 (Tex. App. Waco 2010); Miller v. Vineyard, 765 S.W.2d 865 (Tex. App. Austin 1989), writ denied, (Nov. 8, 1989); Galvin v. Lovell, 257 Wis. 82, 42 N.W.2d 456 (1950).
The lessor anticipatorily breached a commercial lease agreement prior to its expiration when it sent a notice of default to the lessee that indicated that the lessee was breaching the lease by refusing to stop playing music in its restaurant and by refusing to eliminate cooking odors by replacing the ventilation system; the notice contained an unequivocal statement that the lessor planned to retake the premises prior to the end of the lease term if the lessee failed to cease playing music and to eliminate cooking odors, and the lessee argued that it could not comply with the two new terms

to the agreement while continuing to operate its restaurant. Bridger Del Sol, Inc. v. Vincentview, LLC, 2017 MT 293, 389 Mont. 415, 406 P.3d 460 (2017).

[2] Infinity Broadcasting Corp. of Illinois v. Prudential Ins. Co. of America, 869 F.2d 1073 (7th Cir. 1989).
A landlord's repudiation of a valid residential lease and refusal to rent the property to the tenant was a breach of the lease. Bennett v. Broderick, 858 N.E.2d 1044, 61 U.C.C. Rep. Serv. 2d 606 (Ind. Ct. App. 2006).

[3] 2401 Pennsylvania Ave. Corp. v. Federation of Jewish Agencies of Greater Philadelphia, 507 Pa. 166, 489 A.2d 733 (1985).

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b. Covenants and Conditions

(1) In General

§ 77. By and against whom lease covenants may be enforced

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 1002, 1027

Forms

Am. Jur. Pleading and Practice Forms, Landlord and Tenant § 2 (Complaint, petition, or declaration—For breach of lease covenant—By landlord against tenant—General form)

Covenants in leases which are of such character as to run with the land may, in accord with general rules applicable to covenants of this character,[1] be enforced by or against the assignee of the leasehold, or by or against the owner of the reversion acquiring title either by a transfer inter vivos or by a devolution of title upon the death of the landlord, according to whether the benefit or the burden of the covenant is in favor of or against the lessee.[2] However, in this connection it has been held that a lease covenant does not run with the land unless it touches or concerns the land, that is, unless it enhances the value of the land and confers a benefit upon the land; otherwise, a lease covenant is a collateral and personal obligation of the particular lessee or lessor undertaking the promise.[3] A landlord's covenant to refund a tenant's security deposit does not run with the land where the lease permits, but does not require, that the deposit, if forfeited, be used for the benefit of the leased property; rather, the covenant is a personal obligation and, therefore, a successor landlord is not obligated to refund the tenant's security deposit.[4]

Footnotes

[1] Am. Jur. 2d, Covenants, Conditions, and Restrictions §§ 21 to 28.

[2] As to a person by and against whom particular covenants may be enforced, see §§ 78, 418, 577.

[3] Peyton Bldg., LLC v. Niko's Gourmet, Inc., 180 Wash. App. 674, 323 P.3d 629 (Div. 3 2014); Mullendore Theatres, Inc. v. Growth Realty Investors Co., 39 Wash. App. 64, 691 P.2d 970 (Div. 2 1984).

[4] Mullendore Theatres, Inc. v. Growth Realty Investors Co., 39 Wash. App. 64, 691 P.2d 970 (Div. 2 1984).

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(1) In General

§ 78. Effect of breach of lease covenant, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1005, 1007, 1008, 1020 to 1022

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant §§ 7.1, 10.1, 10.2, 11.1, 11.2, 11.3, 13.1

Actions for breach of covenants in leases generally are governed by contract principles.[1] Breaches of lease covenants, like breaches of any contract provision, ordinarily give rise to a cause of action for damages proximately resulting from the breaching party's conduct,[2] as long as such damages may reasonably be said to have been in the contemplation of both parties at the time they made the covenant.[3]

The party benefiting from the particular covenant generally is entitled to recover that amount which will place it in the same position it would have been in had the covenant not been breached.[4] It has also been held that in an action for breach of a covenant with respect to the use of the premises, which breach deprives the tenant in some measure of the benefit of the lease, the measure of damages generally is the difference between the rental value of the premises in the condition contracted for and their value as they actually exist.[5]

The consequential damages for the breach of a landlord's covenant may include the lessee's lost profits which have been directly and necessarily occasioned by the landlord's wrongful act or default, and were reasonably within the minds of the

parties at the time of the contract, if specially set forth and proved.[6]

A party suing for specific damages resulting from violation of a covenant in a lease has both the burden of proving the existence of injuries, and the burden of proving damages with reasonable certainty; the amount of damages may not be based on speculation or conjecture.[7]

Observation:

The Restatement provides that except to the extent the parties to a lease validly agree otherwise, if the tenant fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the landlord is deprived of a significant inducement to the making of the lease, if the tenant does not perform the tenant's promise within a reasonable period of time after being requested to do so, the landlord may (1) terminate the lease and recover damages, or (2) continue the lease and obtain appropriate equitable and legal relief including, recovery of damages, and recovery of the reasonable cost of performing the tenant's promise.[8]

In turn, except to the extent the parties to a lease validly agree otherwise, if the landlord fails to perform a valid promise contained in the lease to do, or to refrain from doing, something on the leased property or elsewhere, and as a consequence thereof, the tenant is deprived of a significant inducement to the making of the lease, and if the landlord does not perform the landlord's promise in a reasonable period of time after being requested to do so, the tenant may either terminate the lease[9] and recover damages;[10] or continue the lease and obtain appropriate equitable and legal relief, including the following:

- the recovery of damages[11]
- an abatement of the rent to the extent prescribed[12]
- the use of the rent to perform the landlord's promise[13]
- the withholding of the rent in the manner and to the extent prescribed[14] until the landlord performs his promise[15]

Footnotes

1 Summit Foods, Inc. v. Greyhound Food Management, Inc., 752 F. Supp. 363 (D. Colo. 1990); House v. Federal Home Loan Mortgage Corporation, 261 F. Supp. 3d 623 (E.D. N.C. 2016), aff'd, 699 Fed. Appx. 259 (4th Cir. 2017) (applying North Carolina law); Arnold Crossroads, LLC v. Gander Mountain Company, 471 S.W.3d 721 (Mo. Ct. App. E.D. 2015); Bayne v. Smith, 2009 PA Super 11, 965 A.2d 265 (2009).

2 Rittenberg v. Donohoe Const. Co., Inc., 426 A.2d 338 (D.C. 1981); Rosamond v. Mann, 80 So. 2d 317, 49 A.L.R.2d 476 (Fla. 1955); Quincy Mall, Inc. v. Kerasotes Showplace Theatres, LLC, 388 Ill. App. 3d 820, 328 Ill. Dec. 227, 903 N.E.2d 887 (4th Dist. 2009); Cohen v. Wozniak, 16 N.J. Super. 510, 85 A.2d 9 (Ch. Div. 1951); Mitchell v. Lovato, 1982-NMSC-018, 97 N.M. 425, 640 P.2d 925 (1982).

3 Sundown, Inc. v. Canal Square Associates, 390 A.2d 421 (D.C. 1978).
As to the measure and elements of damages for breach of a landlord's covenant or agreement to repair, see §§ 461 to 464.

4 Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 575 P.2d 869 (1978); Ringwood Associates, Ltd. v. Jack's of Route 23, Inc., 153 N.J. Super. 294, 379 A.2d 508 (Law Div. 1977), judgment aff'd, 166 N.J. Super. 36, 398 A.2d 1315 (App. Div. 1979).
As to the measure and amount of damages for the breach of a covenant, generally, see Am. Jur. 2d, Covenants, Conditions, and Restrictions § 52.

5 In re Aube, 158 B.R. 567 (Bankr. D. R.I. 1993); Bay Park One Co. v. Crosby, 109 Misc. 2d 47, 442 N.Y.S.2d 837 (App. Term 1981).

6 Cohen v. Wozniak, 16 N.J. Super. 510, 85 A.2d 9 (Ch. Div. 1951).

7 Mitchell v. Lovato, 1982-NMSC-018, 97 N.M. 425, 640 P.2d 925 (1982).

8 Restatement Second, Property: Landlord and Tenant § 13.1.

9 Restatement Second, Property: Landlord and Tenant § 10.1, discussed in § 194.

10 Restatement Second, Property: Landlord and Tenant § 10.2.

11 Restatement Second, Property: Landlord and Tenant § 10.2.

12 Restatement Second, Property: Landlord and Tenant § 11.1, discussed in § 551.

13 Restatement Second, Property: Landlord and Tenant § 11.2.

14 Restatement Second, Property: Landlord and Tenant § 11.3.

15 Restatement Second, Property: Landlord and Tenant § 7.1.

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(1) In General

§ 79. Effect of failure to comply with condition of lease, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 995, 1020, 1021

Where there is an express provision in a lease creating a condition precedent, forfeiture of the lease has been held to be the appropriate remedy in the event that the party with responsibility to fulfill the condition fails to do so.[1] However, forfeitures are not favored in the law,[2] and lease provisions which lead to a forfeiture will always be construed strictly in such a way as to prevent, rather than aid, the forfeiture.[3] Because a lease condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created, if the lease agreement can be reasonably interpreted so as to avoid forfeiture, it is the court's duty to do so.[4]

Thus, there is authority holding that where a party's failure to fulfill a condition precedent to a lease is the result of accident or mistake, equity may relieve the party from a forfeiture of the lease. In addition, where a lessee's failure to fulfill a condition precedent to a lease is the result of simple neglect, not amounting to accident or mistake, equity will intervene to prevent a forfeiture of the lease if (1) the delay in fulfilling the condition has been slight, (2) the lessor's loss due to the delay has been small, and (3) to not grant relief would result in such hardship to the lessee so as to make it unconscionable to enforce the condition precedent literally.[5] However, where the failure to fulfill a condition precedent to a lease is the result of willful and gross negligence, there will be no equitable relief from the forfeiture of the lease.[6]

The breach of a condition subsequent gives rise to a right to damages to the party who would benefit from performance.[7]

Footnotes

[1] Chastain v. Spectrum Stores, Inc., 204 Ga. App. 65, 418 S.E.2d 420 (1992).

[2] Chastain v. Spectrum Stores, Inc., 204 Ga. App. 65, 418 S.E.2d 420 (1992); Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

[3] Matter of Cheshire Molding Co., 9 B.R. 309 (Bankr. D. Conn. 1981).

[4] Boston LLC v. Juarez, 245 Cal. App. 4th 75, 199 Cal. Rptr. 3d 452 (2d Dist. 2016), review denied, (May 11, 2016).

[5] Seven Fifty Main Street Associates Ltd. Partnership v. Spector, 5 Conn. App. 170, 497 A.2d 96 (1985); Trollen v. City of Wabasha, 287 N.W.2d 645 (Minn. 1979); Inn of Hills, Ltd. v. Schulgen & Kaiser, 723 S.W.2d 299 (Tex. App. San Antonio 1987), writ refused n.r.e., (June 24, 1987).

[6] Seven Fifty Main Street Associates Ltd. Partnership v. Spector, 5 Conn. App. 170, 497 A.2d 96 (1985); Trollen v. City of Wabasha, 287 N.W.2d 645 (Minn. 1979); Inn of Hills, Ltd. v. Schulgen & Kaiser, 723 S.W.2d 299 (Tex. App. San Antonio 1987), writ refused n.r.e., (June 24, 1987).

[7] Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

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(1) In General

§ 80. Waiver or estoppel of covenant or condition of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606

A.L.R. Library

Estoppel of lessee, because of occupancy of, or other activities in connection with, premises, to assert invalidity of lease because of irregularities in description or defects in execution, 84 A.L.R.2d 920

There is authority holding that when rent is accepted by a landlord with knowledge of particular conduct which is claimed to be default on the part of the tenant, acceptance of the rent constitutes a waiver by the landlord of the tenant's default and is, in effect, an election by the landlord to continue the relationship of landlord and tenant.[1] However, where the covenants or conditions set forth in the lease are continuing in their nature, such as covenants for the payment of rent at stated intervals, or for the carrying on of only certain kinds of business in the demised premises, or against subletting without the lessor's written consent, it has been held that the consent to or waiver of a breach does not preclude the right of the lessor to proceed against the lessee for subsequent breaches.[2] A commercial lease's general "good faith and fair dealing" provision does not impose an obligation on the landlord to explicitly state, after previously accepting untimely renewal notices and annual rent payment, that it was not waiving its right to enforce the lease's specific notice and renewal provision in the future, where the lease contains a specific nonwaiver provision providing that the landlord's failure to insist on strict performance of a term in one instance "shall not be deemed a waiver of any subsequent breach or default."[3]

Conditions precedent in a lease agreement, such as notice-of-intent-to-renew provisions, are to the benefit of the lessor; as a result, the lessor can waive those provisions while demanding the lessee to perform under the contract.[4]

Footnotes

1 Atkin's Waste Materials, Inc. v. May, 34 N.Y.2d 422, 358 N.Y.S.2d 129, 314 N.E.2d 871 (1974).

2 Knoop v. Penn Eaton Motor Oil Co., 331 Mich. 693, 50 N.W.2d 329 (1951).

3 Randy Faulkner & Associates, Inc. v. Restoration Church, Inc., 62 N.E.3d 1204 (Ind. Ct. App. 2016).

4 Randy Faulkner & Associates, Inc. v. Restoration Church, Inc., 60 N.E.3d 274 (Ind. Ct. App. 2016), adhered to on reh'g, 62 N.E.3d 1204 (Ind. Ct. App. 2016).

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(2) Restrictive Noncompetition Covenants

§ 81. Enforceability of noncompetition covenants in lease as dependent upon reasonableness of restriction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 606, 995, 1001 to 1003, 1012, 1013, 1015(3), 1020, 1021, 1048, 1083

Forms

Am. Jur. Legal Forms 2d § 161:140 (Form drafting guide—Checklist Matters to consider when drafting a shopping center master net lease)
Am. Jur. Legal Forms 2d § 161:141 (Form drafting guide—Checklist Matters to consider when drafting a shopping center unit lease)
Am. Jur. Legal Forms 2d § 161:143 (Shopping center—Master net lease of entire premises)

The enforceability of a restrictive covenant prohibiting the lessor from using or permitting the use of his or her land in competition with the business of a tenant is conditioned upon the reasonableness of the restraint imposed.[1] In this connection, it has been held that a covenant in a shopping center lease restricting competition is valid and enforceable, so long as the restriction is not greater than that required for the protection of the tenant for whose benefit it is imposed, and so long as the restriction does not cause an undue hardship upon those restricted.[2]

The parties seeking enforcement of the restrictive covenant must therefore allege and prove some legitimate business or

proprietary interest requiring protection for which enforcement is sought.[3] A covenant not to compete will not be enforced if at the time its enforcement is desired it appears that the restriction is of no actual or substantial benefit to the person seeking its enforcement.[4]

A restrictive covenant in a commercial lease, which contains a radius restriction prohibiting the tenant, a women's clothing and accessories boutique, from opening or operating other stores selling women's clothing and accessories under the tenant's trade name within a five-mile territorial radius is enforceable, where the five-mile territorial radius is reasonable, the duration of restriction is coterminus with the lease, and the scope of activity is limited to the opening or operation of the specific type of store covered by the lease.[5]

Footnotes

1 American Nat. Bank and Trust Co. of Chicago v. Tufano, 222 Ill. App. 3d 778, 165 Ill. Dec. 221, 584 N.E.2d 400 (1st Dist. 1991).

2 J.C. Penney Co., Inc. v. Giant Eagle, Inc., 813 F. Supp. 360 (W.D. Pa. 1992), judgment aff'd, 995 F.2d 217 (3d Cir. 1993).

3 American Nat. Bank and Trust Co. of Chicago v. Tufano, 222 Ill. App. 3d 778, 165 Ill. Dec. 221, 584 N.E.2d 400 (1st Dist. 1991).

4 Square Lex 48 Corp. v. Shelton Towers Associates, 98 Misc. 2d 1039, 415 N.Y.S.2d 325 (Sup 1978).

5 Fab'rik Boutique, Inc. v. Shops Around Lenox, Inc., 329 Ga. App. 21, 763 S.E.2d 492 (2014).

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§ 82. Who may enforce restrictive noncompetition covenant in lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1001, 1005, 1015(3), 1027

An assignee of the leasehold may enforce the lessor's covenant restricting his or her use of other premises,[1] though there is also authority to the contrary.[2]

Footnotes

1 Goldberg v. Tri-States Theatre Corporation, 126 F.2d 26 (C.C.A. 8th Cir. 1942); Flagg v. Andrew Williams Stores, 127 Cal. App. 2d 165, 273 P.2d 294 (1st Dist. 1954).

2 Safran v. Westrich, 136 Misc. 81, 240 N.Y.S. 238 (Sup 1930).

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§ 83. Against whom restrictive noncompetition covenant in lease may be enforced

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1001, 1005, 1015(3), 1027

A restrictive noncompetition covenant, providing that the landlord will not use or permit to be used property owned or controlled by the landlord in competition with the tenant's business, cannot be enforced against a subsequent holder of the fee who was not a party to the lease, except to the extent that the original parties' intentions are manifested in the language of the lease and, therefore, it can be said that the subsequent holder has either actual or constructive notice of the restriction.[1] If notice is present, a covenant in a lease binding the landlord not to use or lease other premises which the landlord owns in competition with a lessee-covenantee is binding upon, and enforceable against, successors to the covenantor, such as purchasers of the restricted premises or assignees from the original covenantor, and those taking through the covenantor's successors, such as lessees or assignees from a subsequent purchaser.[2] Merger of the term of a lease in the fee, where property is conveyed by the lessor and a lease thereof assigned by the tenant to the grantee, does not extinguish the lessor's covenant in the lease as to the use of adjoining property also owned by the lessor.[3]

However, a restrictive covenant in a lease providing that the landlord will not use or permit to be used other premises owned by the landlord in competition with the covenantee-lessee is generally not enforceable as against a prior lessee acting in accordance with the terms of the prior lessee's prior lease.[4]

Footnotes

[1] Reeve v. Hawke, 37 Del. Ch. 25, 136 A.2d 196 (1957); Moorhead v. Luther, 219 Ga. 242, 132 S.E.2d 669 (1963);

Square Lex 48 Corp. v. Shelton Towers Associates, 98 Misc. 2d 1039, 415 N.Y.S.2d 325 (Sup 1978).

[2] Flagg v. Andrew Williams Stores, 127 Cal. App. 2d 165, 273 P.2d 294 (1st Dist. 1954); R.M. Sedrose, Inc. v. Mazmanian, 326 Mass. 578, 95 N.E.2d 677 (1950); Weiss v. Mayflower Doughnut Corp., 1 N.Y.2d 310, 152 N.Y.S.2d 471, 135 N.E.2d 208 (1956).

[3] Legum v. Carlin, 168 Md. 191, 177 A. 287, 99 A.L.R. 536 (1935).

[4] Norwood Shopping Center, Inc. v. MKR Corp., 135 So. 2d 448, 97 A.L.R.2d 1 (Fla. 3d DCA 1961); Hill Top Toys, Inc. v. Great Atlantic & Pacific Tea Co., 4 A.D.2d 691, 164 N.Y.S.2d 269 (2d Dep't 1957).

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§ 84. What constitutes breach of restrictive noncompetition covenant in lease, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1015(3)

A.L.R. Library

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

Trial Strategy

Material Breach of Commercial Lease, 7 Am. Jur. Proof of Facts 3d 655 (Breaches by landlord—Violation of noncompetition covenant)

Whether there has been a violation of a covenant or restriction as to the use of the lessor's other premises in competition with a business-lessee depends upon the wording of the particular covenant and the facts of the individual case; a covenant by lessors not to compete "in any way" with the lessee's business has been held to include all or every manner or mode of competing.[1] By contrast, there is no violation of the restrictive covenant where the competing lessee's business falls within an

express contractual exception from the covenant.[2] A lessor does not breach its covenant not to rent to a competitor of the first tenant where another tenant subleases, without the lessor's knowledge, a portion of its premises to a competitor of the first tenant.[3] A lessor does not breach a restrictive covenant in a lease for a 1950s style diner when the lessor leases space in the shopping center to all other diners, it only breaches the covenant if the lessor leases to a diner similar in concept.[4]

Footnotes

1 Uptown Food Store, Inc. v. Ginsberg, 255 Iowa 462, 123 N.W.2d 59, 1 A.L.R.3d 765 (1963).
A landlord violated a restrictive covenant in a tenant restaurant operator's lease by permitting a competing tenant pizzeria to expand its seafood menu, alter its logo to include "Mediterranean Cuisine" in addition to its pizza offerings, and install new awnings, where these changes brought the pizzeria within the realm of a more formal Mediterranean restaurant that was expressly prohibited by the covenant. Hussein Environment, Inc. v. Roxborough Apartments Corp., 92 A.D.3d 426, 938 N.Y.S.2d 23 (1st Dep't 2012).

2 Lamport v. 4175 Broadway, 6 F. Supp. 923 (S.D. N.Y. 1934); Glen Burnie Shopping Plaza, Inc. v. Schreiber Bros., Inc., 220 Md. 303, 152 A.2d 807 (1959).
A fudge, candy, and snack shop in a shopping center did not violate the restrictive covenant in the commercial tenant's lease prohibiting competing food supermarkets or grocery stores, and, even if it did, it fell within the covenant's safe harbor exception for candy and specialty food stores, where it sold only homemade fudge, chocolate, candy, fruit, snack foods, and dry bulk foods. Redner's Markets, Inc. v. Joppatowne G.P. Ltd. Partnership, 594 Fed. Appx. 798 (4th Cir. 2014).

3 Rains Inv. Co., Inc. v. George Roe & Associates, Inc., 140 Ga. App. 566, 231 S.E.2d 460 (1976).

4 Northglenn Gunther Toody's, LLC v. HQ8-10410-10450 Melody Lane LLC, 702 Fed. Appx. 702 (10th Cir. 2017).

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§ 85. Availability and forms of relief for breach of restrictive noncompetition covenant in lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 995, 1015(3), 1031(2), 1031(3), 1054(5)

Monetary relief in the form of damages is an appropriate remedy where a lessor has breached a covenant not to use the lessor's other premises in competition with the lessee's business, or to lease the lessor's other property to a competing business of the tenant.[1] Injunctive relief has also been granted where the lessor has breached either an express covenant not to lease other property to a competing business of the tenant,[2] or the implied covenant not to lease to a competitor of the tenant which arises where the lease contains a grant of exclusive mercantile rights to the tenant.[3]

The business-tenant's most efficacious remedy in a case where the lessor has covenanted not to use or lease other property owned or controlled by the lessor in competition with the tenant's business, is by way of an injunction enjoining the breach of such covenant.[4] However, there is authority holding that a lessee is not entitled to injunctive relief notwithstanding the lessor's express covenant not to lease to a competitor of the tenant and notwithstanding that the lessor leased premises to an alleged competitor, where (1) the alleged competitor's lease is signed prior to the tenant's suit in equity, (2) the alleged competitor had no actual or constructive notice of the lessor's covenant against competition, and (3) no showing is made of a likelihood of a future violation by the lessor.[5]

Footnotes

[1] Flagg v. Andrew Williams Stores, 127 Cal. App. 2d 165, 273 P.2d 294 (1st Dist. 1954); Gilmore Intern. Travel, Inc. v. Equitable Life Assur. Society of U.S., 183 Ga. App. 116, 358 S.E.2d 279 (1987); Krikorian v. Dailey, 171 Va. 16, 197

S.E. 442 (1938).
The tenant restaurant operator was not entitled to money damages based on the landlord's alleged violation of a restrictive covenant in the restaurant operator's lease, in an action arising from the landlord permitting a competing tenant pizzeria to expand its menu, alter its logo, and install awnings, where the restaurant operator's proffered evidence of its sales after the pizzeria's changes was insufficient to establish with certainty what sales the restaurant operator lost due to the landlord's breach of the covenant. Hussein Environment, Inc. v. Roxborough Apartments Corp., 92 A.D.3d 426, 938 N.Y.S.2d 23 (1st Dep't 2012).
As to the measurement of damages in the case of breach of a restrictive noncompetition covenant, see § 90.

[2] Flagg v. Andrew Williams Stores, 127 Cal. App. 2d 165, 273 P.2d 294 (1st Dist. 1954); Parker v. Lewis Grocer Co., 246 Miss. 873, 153 So. 2d 261 (1963); Weiss v. Mayflower Doughnut Corp., 1 N.Y.2d 310, 152 N.Y.S.2d 471, 135 N.E.2d 208 (1956); Bookman v. Cavalier Court, Inc., 198 Va. 183, 93 S.E.2d 318 (1956).

[3] Shoe Town (NY), Inc. v. Independent Properties Co., Inc., 89 A.D.2d 674, 453 N.Y.S.2d 778 (3d Dep't 1982).

[4] Flagg v. Andrew Williams Stores, 127 Cal. App. 2d 165, 273 P.2d 294 (1st Dist. 1954); Weiss v. Mayflower Doughnut Corp., 1 N.Y.2d 310, 152 N.Y.S.2d 471, 135 N.E.2d 208 (1956); Bookman v. Cavalier Court, Inc., 198 Va. 183, 93 S.E.2d 318 (1956).

[5] Meredith Hardware, Inc. v. Belknap Realty Trust, 117 N.H. 22, 369 A.2d 204 (1977).

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§ 86. Repudiation or rescission of lease after breach of restrictive noncompetition covenant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1015(3), 1031(1), 1031(2)

Because breach of a restrictive covenant by the lessor not to compete or not to permit the lessor's other premises to be used to compete with the tenant's business is intrinsic to the lease, such breach justifies a lessee's repudiation of the lease;[1] the lessee may treat the violation of the covenant as putting an end to the contract for purposes of performance, and then may sue for damages.[2] Where the lessee rescinds the lease and surrenders the premises, the lessee will not be held liable for further rent.[3]

Footnotes

1 Johnstowne Centre Partnership v. Chin, 99 Ill. 2d 284, 76 Ill. Dec. 80, 458 N.E.2d 480 (1983).

2 Humphrey v. Trustees of Columbia University in City of New York, 228 A.D. 168, 239 N.Y.S. 461 (1st Dep't 1930); Bookman v. Cavalier Court, Inc., 198 Va. 183, 93 S.E.2d 318 (1956).
As to the measurement of damages for breach of a restrictive noncompetition covenant, see § 90.

3 Medico-Dental Bldg. Co. of Los Angeles v. Horton & Converse, 21 Cal. 2d 411, 132 P.2d 457 (1942); Bookman v. Cavalier Court, Inc., 198 Va. 183, 93 S.E.2d 318 (1956).

Works.

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(1) In General

§ 87. Applicability of contract principles in measuring damages for breach of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 995, 1015(3), 1031(2), 1031(3), 1054(5)

The measure and elements of damages upon the breach of a lease is governed by the general principles which determine the measure of damages on claims arising from breaches of other kinds of contracts.[1] The general rule of contracts, to the effect that the plaintiff may recover damages only to the extent of its injury, applies to leases.[2] Damages for breach of a lease should, as a general rule, reflect a compensation reasonably determined to place the injured party in the same position as the injured party would have been in had the breach not occurred and the contract been fully performed,[3] taking into account, however, the duty to mitigate damages.[4] In addition, damages resulting from breach of a lease must have been within the contemplation of the parties, must have been proximately caused by the breach, and must be ascertainable with reasonable certainty without resort to speculation and conjecture.[5]

Footnotes

1 C. D. Stimson Co. v. Porter, 195 F.2d 410 (10th Cir. 1952); Summit Foods, Inc. v. Greyhound Food Management, Inc., 752 F. Supp. 363 (D. Colo. 1990); Sigsbee v. Swathwood, 419 N.E.2d 789 (Ind. Ct. App. 1981); Cohen v. Wozniak, 16 N.J. Super. 510, 85 A.2d 9 (Ch. Div. 1951).

2 Chicago Title & Trust Co. v. Brooklyn Bagel Boys, Inc., 222 Ill. App. 3d 413, 164 Ill. Dec. 930, 584 N.E.2d 142 (1st Dist. 1991).

3 C. D. Stimson Co. v. Porter, 195 F.2d 410 (10th Cir. 1952); Summit Foods, Inc. v. Greyhound Food Management,

Inc., 752 F. Supp. 363 (D. Colo. 1990); Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987); Rokalor, Inc. v. Connecticut Eating Enterprises, Inc., 18 Conn. App. 384, 558 A.2d 265 (1989); Family Medical Bldg., Inc. v. State, Dept. of Social & Health Services, 104 Wash. 2d 105, 702 P.2d 459 (1985).

[4] §§ 88, 608.

[5] Palmer v. Albert, 310 N.W.2d 169 (Iowa 1981); Nashland Associates v. Shumate, 730 S.W.2d 332 (Tenn. Ct. App. 1987).
As to the measure and elements of damages for breach of an agreement for a lease, see §§ 14 to 17.

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(2) Breach by Lessor

§ 88. Damages for breach by lessor, generally

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West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 995, 1015(3), 1029(4), 1030(2), 1031(2), 1054(3), 1055

Model Codes and Restatements

Restatement Second, Property: Landlord and Tenant § 10.2

When a tenant is forced by the landlord's breach of a provision in a lease to give up or terminate the lease, the general rule is that the lessee may recover damages in an amount equal to the difference between the fair rental value of the unexpired term of the lease, and the agreed-upon rent,[1] discounted to its present value,[2] plus any special or consequential damages which are the direct and proximate result of the breach of contract by the lessor.[3] A tenant who is forced by the landlord's breach of lease to give up the lease incurs compensable damages to the extent that the tenant has to pay more for comparable space over the term of the original lease, plus any special damages.[4]

In order to be recoverable, the lessee's damages must be certainly and correctly estimated by reliable data.[5] The reasonable rental value of the property for the remainder of the term may be objectively determined by an appraisal.[6]

A lessee is required to make a reasonable effort to mitigate damages resulting from a lessor's breach.[7]

The Restatement provides that if the tenant is entitled to recover damages from the landlord for the landlord's failure to fulfill

the landlord's obligations under the lease, absent a valid agreement as to the measure of damages, damages may include one or more of the following items as may be appropriate so long as no double recovery is involved:[8]

(1) if the tenant is entitled to terminate the lease and does so, the fair market value of the lease on the date the tenant terminates the lease;

(2) the loss sustained by the tenant due to reasonable expenditures made by the tenant before the landlord's default which the landlord at the time the lease was made could reasonably have foreseen would be made by the tenant;

(3) if the tenant is entitled to terminate the lease and does so, reasonable relocation costs;

(4) if the lease is not terminated, reasonable additional costs of substituted premises incurred by the tenant as a result of the landlord's default while the default continues;

(5) if the use of the leased property contemplated by the parties is for business purposes, loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be caused by the default;

(6) if the tenant eliminates the default, the reasonable costs incurred by the tenant in eliminating the default; and

(7) interest on the amount recovered at the legal rate for the period appropriate under the circumstances.

Footnotes

1 Cambron v. Carlisle, 435 So. 2d 1216 (Ala. 1983); Garcia v. Llerena, 599 A.2d 1138 (D.C. 1991); Thomas v. Amoco Oil Co., 455 So. 2d 1187 (La. Ct. App. 4th Cir. 1984), writ denied, 460 So. 2d 612 (La. 1984) and writ denied, 460 So. 2d 612 (La. 1984); Johnston v. Stinson, 434 So. 2d 715 (Miss. 1983); Economy Rentals, Inc. v. Garcia, 1991-NMSC-092, 112 N.M. 748, 819 P.2d 1306 (1991).

2 Johnston v. Stinson, 434 So. 2d 715 (Miss. 1983).

3 Cambron v. Carlisle, 435 So. 2d 1216 (Ala. 1983); WSG West Palm Beach Development, LLC v. Blank, 990 So. 2d 708 (Fla. 4th DCA 2008); Thomas v. Amoco Oil Co., 455 So. 2d 1187 (La. Ct. App. 4th Cir. 1984), writ denied, 460 So. 2d 612 (La. 1984) and writ denied, 460 So. 2d 612 (La. 1984).

4 Garcia v. Llerena, 599 A.2d 1138 (D.C. 1991).

5 Cambron v. Carlisle, 435 So. 2d 1216 (Ala. 1983).

6 Garcia v. Llerena, 599 A.2d 1138 (D.C. 1991).

7 Sigsbee v. Swathwood, 419 N.E.2d 789 (Ind. Ct. App. 1981); Endersby v. Schneppe, 73 Ohio App. 3d 212, 596 N.E.2d 1081 (3d Dist. Allen County 1991).

8 Restatement Second, Property: Landlord and Tenant § 10.2.

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(2) Breach by Lessor

§ 89. Recovery of lost profits for breach by lessor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1015(3), 1029(4), 1030(2), 1031(2)

A.L.R. Library

Recovery of expected profits lost by lessor's breach of lease preventing or delaying operation of new business, 92 A.L.R.3d 1286

In appropriate circumstances, a landlord's breach of a lease may give rise to the tenant's right to recover lost profits. Damages for lost profits arising from a breach of a lease agreement are recoverable if they were within the reasonable contemplation of the parties at the time of contracting and have been established with reasonable certainty.[1] The standard of reasonable certainty does not demand proof with mathematical exactitude; rather, it requires only that the damages be taken out of the realm of speculation.[2] A business-lessee may recover the loss of future or anticipated profits due to the lessor's breach of a lease where the business has established a pattern of profits.[3]

Footnotes

[1] Garcia v. Llerena, 599 A.2d 1138 (D.C. 1991); Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc., 902 So. 2d 901

(Fla. 4th DCA 2005); Galindo v. Hibbard, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984); Cohn Realty Co. v. Able Moving and Storage Co., Inc., 402 So. 2d 106 (La. Ct. App. 1st Cir. 1981); Economy Rentals, Inc. v. Garcia, 1991-NMSC-092, 112 N.M. 748, 819 P.2d 1306 (1991); SnB, Incorporation v. Ehlers, 98 Or. App. 562, 779 P.2d 625 (1989); Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc., 2008 SD 10, 745 N.W.2d 371 (S.D. 2008).

[2] Mustard's Last Stand, Inc. v. Lorenzen, 39 Colo. App. 225, 566 P.2d 1082 (App. 1977), judgment rev'd on other grounds, 196 Colo. 265, 586 P.2d 12 (1978); Galindo v. Hibbard, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984); Visnick v. Hawley, 69 Mass. App. Ct. 901, 866 N.E.2d 946 (2007).

[3] Mustard's Last Stand, Inc. v. Lorenzen, 39 Colo. App. 225, 566 P.2d 1082 (App. 1977), judgment rev'd on other grounds, 196 Colo. 265, 586 P.2d 12 (1978).
The tenant failed to prove lost profits in an action for breach of a commercial lease, where the tenant's expert consultant, in analyzing the viability of the tenant's proposed facility, did not evaluate any comparable facility's profitability as a yardstick. Victoriana Building, LLC v. Ft. Lauderdale Surgical Center, LLC, 166 So. 3d 861 (Fla. 4th DCA 2015).

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(2) Breach by Lessor

§ 90. Damages for breach of restrictive noncompetition covenant by lessor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1015(3), 1029(4), 1030(2), 1031(2), 1054(3), 1055

A.L.R. Library

Validity, construction, and effect of lessor's covenant against use of his other property in competition with the lessee-covenantee, 97 A.L.R.2d 4

Monetary relief in the form of damages is an appropriate remedy where a lessor has breached a covenant not to use the lessor's other premises in competition with the lessee's business, or to lease the lessor's other property to a competing business of the tenant.[1] The appropriate measure of damages recoverable from a lessor who has breached such a restrictive covenant has been held to be the difference in value between the plaintiff's leasehold with the covenant against competition unbroken and the same leasehold with a competing store or other business on the adjacent premises.[2] In some cases, courts have also allowed recovery of damages predicated upon the loss of anticipated profits consequent upon the breach of the restrictive covenant,[3] although in some cases recovery has been denied for loss of profits, on the ground of insufficient evidence or of the fact that the assessment of damages on such basis would be uncertain or speculative.[4] There is also authority holding that evidence of loss of profits is admissible only insofar as it bears upon the difference in the value of the plaintiff's leasehold with a covenant against competition unbroken and the same leasehold with a competing store on the adjacent premises.[5]

Footnotes

1 § 85.

2 Fontainbleau Hotel Corp. v. Crossman, 323 F.2d 937 (5th Cir. 1963); Gilmore Intern. Travel, Inc. v. Equitable Life Assur. Society of U.S., 183 Ga. App. 116, 358 S.E.2d 279 (1987); Parker v. Levin, 285 Mass. 125, 188 N.E. 502, 90 A.L.R. 1446 (1934); C. L. Holding Corporation v. Schutt Court Homes, 307 N.Y. 648, 120 N.E.2d 837 (1954).

3 Rental Development Corp. of America v. Lavery, 304 F.2d 839, 6 Fed. R. Serv. 2d 992 (9th Cir. 1962); Hildebrand v. Stonecrest Corp., 174 Cal. App. 2d 158, 344 P.2d 378 (1st Dist. 1959); Freedman v. Seidler, 233 Md. 39, 194 A.2d 778 (1963); Krikorian v. Dailey, 171 Va. 16, 197 S.E. 442 (1938).

4 Santa Claus, Inc. v. Santa Claus of Santa Claus, 217 Ind. 251, 27 N.E.2d 354 (1940); C. L. Holding Corporation v. Schutt Court Homes, 307 N.Y. 648, 120 N.E.2d 837 (1954); Allbritton v. Mading's Drug Stores, 138 S.W.2d 901 (Tex. Civ. App. Galveston 1940).

5 Gilmore Intern. Travel, Inc. v. Equitable Life Assur. Society of U.S., 183 Ga. App. 116, 358 S.E.2d 279 (1987); Parker v. Levin, 285 Mass. 125, 188 N.E. 502, 90 A.L.R. 1446 (1934).

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(3) Breach by Lessee

§ 91. Damages for breach by lessee, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1006, 1013, 1020, 1021, 1030(2), 1031(2)

Where a landlord chooses to treat the conduct of a tenant as an anticipatory breach of the lease, retake possession of the premises, and relet to a subsequent tenant, there are essentially two different measures of damages depending on the term of the subsequent lease. If the term of the subsequent lease runs concurrent with the entire term of the original lease, then the measure of damages for the unexpired term of the lease is the contractual rental reduced by the amount to be received from the new tenant. If the landlord relets the new premises for only a portion of the unexpired term, then the measure of damages has two components: (1) the measure of damages for the period of reletting is the contractual rental provided in the original lease less the amount realized from reletting, and (2) the measure of damages for that portion or period of the lease term as to which there has been no reletting is the difference between the present value of the rentals contracted for in the lease and the reasonable cash market value of the lease for its unexpired term.[1] If the landlord is unable to secure a substitute tenant after making reasonable efforts to do so, or if the premises have been rendered unmarketable, there is authority holding that the landlord is entitled to an amount equal to the full amount of rent reserved in the lease, plus any other consequential damages.[2]

If the landlord has avoided costs by not having to perform under the lease due to the lessee's breach, such as the cost of construction, maintenance, and insurance, these costs should be deducted from the landlord's recovery in order to place the landlord in the position the landlord would have occupied had the tenant performed.[3]

Footnotes

[1] Hawkinson v. Johnston, 122 F.2d 724, 137 A.L.R. 420 (C.C.A. 8th Cir. 1941); C. D. Stimson Co. v. Porter, 195 F.2d 410 (10th Cir. 1952); Chapman and Cole v. Itel Container Intern. B.V., 665 F. Supp. 1283 (S.D. Tex. 1987), judgment aff'd, 865 F.2d 676, 13 Fed. R. Serv. 3d 124 (5th Cir. 1989); Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987); Curran v. Smith-Zollinger Co., 18 Del. Ch. 220, 157 A. 432 (1931); Vibrant Video, Inc. v. Dixie Pointe Associates, 567 So. 2d 1003 (Fla. 3d DCA 1990); Eastgate Associates, Ltd. v. Piggly Wiggly Southern, Inc., 200 Ga. App. 872, 410 S.E.2d 129 (1991); Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1985); Rauch v. Circle Theatre, 176 Ind. App. 130, 374 N.E.2d 546 (1978); Hoppenstein Properties, Inc. v. McLennan County Appraisal Dist., 341 S.W.3d 16 (Tex. App. Waco 2010); Swinnea v. ERI Consulting Engineers, Inc., 236 S.W.3d 825 (Tex. App. Tyler 2007), judgment aff'd in part, rev'd in part on other grounds, 318 S.W.3d 867 (Tex. 2010).
As to the landlord's duty to relet the premises in mitigation of damages, see §§ 608, 609.

[2] Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987); Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1985).
As to consequential damages upon breach by a lessee, generally, see § 92.

[3] Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987); Eastgate Associates, Ltd. v. Piggly Wiggly Southern, Inc., 200 Ga. App. 872, 410 S.E.2d 129 (1991); Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1985); Sliman v. Fish, 177 La. 38, 147 So. 493 (1933).

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(3) Breach by Lessee

§ 92. Consequential damages for breach by lessee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1020, 1021, 1031(2)

Upon breach of a lease by a lessee, the landlord is entitled to recover any consequential or special damages flowing from the breach,[1] provided that such damages could reasonably have been anticipated by the parties,[2] and are pled and proven by the landlord.[3] Expenses for repairs to the premises are properly included in damages assessed against a breaching tenant; and attorney's fees incurred in negotiating a lease with a subsequent lessee are also an appropriate charge resulting from the tenant's breach.[4] Although there is authority that the landlord is entitled to all expenses reasonably incurred in attempting to re-lease or to sell the property,[5] it has also been held that a lessor who has terminated the lease for failure of the lessee to pay the rent cannot recover the broker's commission in renting the property as an item of damages.[6] Where a breaching tenant caused harm such that the lessor's profitability is affected, then that harm is compensable to the extent it is proved.[7]

Footnotes

1 In re Shane Co., 464 B.R. 32 (Bankr. D. Colo. 2012) (applying Colorado law); Schneiker v. Gordon, 732 P.2d 603 (Colo. 1987); Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1985); Peyton Bldg., LLC v. Niko's Gourmet, Inc., 180 Wash. App. 674, 323 P.3d 629 (Div. 3 2014).

2 Family Medical Bldg., Inc. v. State, Dept. of Social & Health Services, 104 Wash. 2d 105, 702 P.2d 459 (1985).

3 Eastgate Associates, Ltd. v. Piggly Wiggly Southern, Inc., 200 Ga. App. 872, 410 S.E.2d 129 (1991).

[4] In re Fernandes Supermarkets, Inc., 1 B.R. 249 (Bankr. D. Mass. 1979).

[5] Olsen v. Country Club Sports, Inc., 110 Idaho 789, 718 P.2d 1227 (Ct. App. 1985).

[6] Mutual Employees Trademart v. Silverman, 202 So. 2d 826 (Fla. 3d DCA 1967).

[7] Plaza Dev. Co. v. W. Cooper Ents., L.L.C., 2014-Ohio-2418, 12 N.E.3d 506 (Ohio Ct. App. 10th Dist. Franklin County 2014).

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(3) Breach by Lessee

§ 93. Damages for breach of long-term lease by lessee

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1020, 1021, 1031(2)

In the case of a long-term lease, the measure of damages for breach of the lease agreement by the tenant is the difference between the present-lease value for the remainder of the term and the present fair rental value for the remainder of the term,[1] so long as that term does not exceed a period for which damages can reasonably be forecast or soundly predicted.[2] The following methods are, at least in theory, available for ascertaining the rental value of the remainder of the term: (1) reletting by the landlord of the whole residue of the term; (2) sale of the remainder of the term at private or public auction; (3) ascertainment by expert witnesses of the market or fair rental value of the remainder of the term, sometimes combined with reletting by the landlord of part of the remainder of the term; and (4) ascertainment on the basis of profits to be anticipated from future operation of the property, the estimate of these profits being projected from past earnings.[3]

Footnotes

1 Connecticut Railway & Lighting Co. v. Palmer, 305 U.S. 493, 59 S. Ct. 316, 83 L. Ed. 309 (1939); City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 57 S. Ct. 292, 81 L. Ed. 324 (1937); Hippodrome Bldg. Co. v. Irving Trust Co., 91 F.2d 753 (C.C.A. 2d Cir. 1937); In re Fernandes Supermarkets, Inc., 1 B.R. 249 (Bankr. D. Mass. 1979); Eastgate Associates, Ltd. v. Piggly Wiggly Southern, Inc., 200 Ga. App. 872, 410 S.E.2d 129 (1991).

2 Hawkinson v. Johnston, 122 F.2d 724, 137 A.L.R. 420 (C.C.A. 8th Cir. 1941).

3 City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 57 S. Ct. 292, 81 L. Ed. 324 (1937); Kuhner v. Irving

Trust Co., 85 F.2d 35 (C.C.A. 2d Cir. 1936), aff'd, 299 U.S. 445, 57 S. Ct. 298, 81 L. Ed. 340 (1937); A. J. Richey Corp. v. Garvey, 132 Fla. 602, 182 So. 216 (1938); Bondy v. Harvey, 218 A.D. 126, 217 N.Y.S. 877 (1st Dep't 1926).

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(4) Attorney's Fees

§ 94. Attorney's fees for breach of lease, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1031(3)

Leases often contain clauses providing for the recovery of attorney's fees in the event that such fees are incurred by a party to the lease due to a default or breach by the other party. Provisions in leases for attorney's fees generally fall into the following two general categories: (1) a stipulation that the lessor is entitled to recover any attorney's fees incurred in enforcing any covenants, conditions, agreements, and obligations of the lessee in the event of a default by the lessee;[1] or (2) a stipulation that in the event of litigation between the parties requiring the services of an attorney, the prevailing party in the action will be entitled to attorney's fees from the nonprevailing party.[2]

An agreement included in a lease providing for the recovery of reasonable attorney's fees is valid and enforceable, at least in the absence of any statutory prohibition against such a provision.[3] Such provision will be construed in its ordinary and popular sense.[4]

Footnotes

[1] Care Constr., Inc. v. Century Convalescent Centers, Inc., 54 Cal. App. 3d 701, 126 Cal. Rptr. 761 (4th Dist. 1976) (disapproved of on other grounds by, Canal-Randolph Anaheim, Inc. v. Wilkoski, 78 Cal. App. 3d 477, 144 Cal. Rptr. 474 (4th Dist. 1978)); Loyalty Development Co., Ltd. v. Wholesale Motors, Inc., 61 Haw. 483, 605 P.2d 925 (1980); Lake Charles Diesel, Inc. v. Guthridge, 326 So. 2d 613 (La. Ct. App. 3d Cir. 1976); Stark Street Properties, Inc. v. Teufel, 277 Or. 649, 562 P.2d 531 (1977).

[2] Kellejian v. Kesicki, 126 Ariz. 12, 612 P.2d 63 (Ct. App. Div. 2 1980); Oak Park Inv. Co. v. Lundy's, Inc., 6 Kan. App. 2d 133, 626 P.2d 1236 (1981); Loch Sheldrake Beach and Tennis Inc. v. Akulich, 141 A.D.3d 809, 36 N.Y.S.3d 525 (3d Dep't 2016), leave to appeal dismissed, 28 N.Y.3d 1104, 45 N.Y.S.3d 365, 68 N.E.3d 93 (2016); D. M. Development Co. v. Osburn, 49 Or. App. 863, 621 P.2d 1186 (1980), adhered to on reconsideration, 51 Or. App. 207, 625 P.2d 157 (1981).

[3] Oak Park Inv. Co. v. Lundy's, Inc., 6 Kan. App. 2d 133, 626 P.2d 1236 (1981).

[4] Stockton Theatres v. Palermo, 124 Cal. App. 2d 353, 268 P.2d 799 (3d Dist. 1954).

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Landlord and Tenant
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II. Leases and Agreements

C. Construction and Operation of Leases

5. Breach of Provisions of Lease; Enforcement and Remedies

c. Measure of Damages

(4) Attorney's Fees

§ 95. Provisions granting attorney's fees to prevailing party for breach of lease

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Landlord and Tenant 1031(3)

Lease provisions which stipulate that in the event of litigation between the parties requiring the services of an attorney, the prevailing party in the action is entitled to attorney's fees from the nonprevailing party, have been held valid and enforceable.[1] However, there is authority holding that attorney's fees are not authorized under such provision in a declaratory judgment action[2] or an action for a judicial appraisal of the premises,[3] because in such actions it cannot be said that there has been a default or breach of the lease or, in turn, that either party has prevailed in the action. In addition, it has been held that under a lease authorizing recovery of attorney's fees by the prevailing party, neither the lessor nor the lessee may recover such fees even though the lessor obtains a judgment for rentals, where the lease is rescinded on the lessee's counterclaim.[4]

CUMULATIVE SUPPLEMENT

Cases:

Residential tenants were entitled to recover reasonable attorney's fees and costs from landlord pursuant to express terms of lease, where lease provided that successful party in legal action or proceeding between landlord and tenant for non-payment of rent or recovery of possession of apartment may recover reasonable legal fees and costs, and tenants obtained dismissal of landlord's action seeking to reform lease so as to remove provision granting exclusive use of backyard to tenants. Mulholland v. Moret, 161 A.D.3d 883, 78 N.Y.S.3d 134 (2d Dep't 2018).

[END OF SUPPLEMENT]

Footnotes

[1] Route Triple Seven Ltd. Partnership v. Total Hockey, Inc., 127 F. Supp. 3d 607 (E.D. Va. 2015); Keg Restaurants Arizona, Inc. v. Jones, 240 Ariz. 64, 375 P.3d 1173 (Ct. App. Div. 1 2016), review denied, (Jan. 10, 2017) (expert witness fees); Ernie Otto Corp. v. Inland Southeast Thompson Monticello, LLC, 91 A.D.3d 1155, 936 N.Y.S.2d 756 (3d Dep't 2012); In re Estate of Hayes, 185 Wash. App. 567, 342 P.3d 1161 (Div. 3 2015).

[2] Chesterfield Co. v. Ritzenheim, 350 So. 2d 15 (Fla. 4th DCA 1977); Ingram v. Sonitrol Sec. Systems of Worcester, Inc., 11 Mass. App. Ct. 754, 419 N.E.2d 1057 (1981).

[3] Cottonwood Hill, Inc. v. Ansay, 709 P.2d 62 (Colo. App. 1985).

[4] Inland Securities Co. v. Valley Cement Co., 45 Wash. 2d 51, 272 P.2d 620 (1954).

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51 Am. Jur. 2d Licenses and Permits Summary

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Licenses and Permits
Jill Gustafson, J.D.

Correlation Table

Summary

Scope:
This article treats matters related to those licenses that are issued by the public, rather than by individuals. It treats the broad principles on which the validity of licensing legislation and procedures rests, which, in turn, restrict and limit the state's powers in this field and which apply, generally, to problems arising out of legislative requirements for, and the refusal, issuance, modification, suspension, and revocation of, licenses. Municipal licensing issues are also discussed.

Federal Aspects:
The law of licenses and permits is subject to limitations imposed by the United States Constitution's First Amendment, which restricts state statutory limitations on freedom of speech, and the 14th Amendment, which insures that licensing statutes comply with due process and equal protection mandates. The law of licenses and permits is also affected by the United States Constitution's Supremacy Clause, such that state legislation may be preempted by federal legislation in the same area, as well as the Commerce Clause, which restricts state limitations on interstate commerce. Federal law may also limit the extent to which a state or licensing entity may grant a monopoly through the use of licensing legislation.

Treated Elsewhere:
Accountants, licensing and certification of, see Am. Jur. 2d, Accountants §§ 1 to 4

Acid rain permits issued by Environmental Protection Agency, see Am. Jur. 2d, Pollution Control §§ 307 to 327

Administrative Procedure Act's provisions regarding licensing, see Am. Jur. 2d, Administrative Law §§ 249 to 267

Adult oriented businesses, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 54 to 59

Airman's certificate, issuance, revocation, suspension, or modification of, see Am. Jur. 2d, Aviation §§ 48 to 57

Amusements and entertainment, licensing of matters concerned with, see Am. Jur. 2d, Entertainment and Sports Law §§ 9 to 14

Architects, regulation and licensing of, see Am. Jur. 2d, Architects §§ 3 to 6

Attorneys at law, regulation and supervision of, see Am. Jur. 2d, Attorneys at Law §§ 13 to 136

Auctions and auctioneers, regulation and licensing of, see Am. Jur. 2d, Auctions and Auctioneers §§ 3 to 12

Barbers and cosmetologists, licensing and regulation of, see Am. Jur. 2d, Barbers and Cosmetologists §§ 4 to 13

Boats, licensing and registration of, see Am. Jur. 2d, Boats and Boating §§ 23 to 25

Broadcasting licenses for radio or television, see Am. Jur. 2d, Telecommunications §§ 142 to 161

Brokers, regulation and licensing of, see Am. Jur. 2d, Brokers §§ 8 to 54

Building and construction contractors, licensing of, see Am. Jur. 2d, Building and Construction Contracts § 129

Buildings, permits to erect, see Am. Jur. 2d, Buildings §§ 12 to 15

Carriers' operations, regulation and control of, see Am. Jur. 2d, Aviation §§ 60, 64 to 67; Am. Jur. 2d, Carriers §§ 26 to 111

Clean Air Act, permits to operate sources of air pollution under, see Am. Jur. 2d, Pollution Control §§ 462 to 469

Controlled substances, permits for importation or exportation of, see Am. Jur. 2d, Drugs and Controlled Substances § 99

Divorce or separation, effect of party's possession of professional license on division of property pursuant to, see Am. Jur. 2d, Divorce and Separation §§ 499 to 502

Dredged or fill material, permits for discharge of, see Am. Jur. 2d, Pollution Control §§ 864 to 866

Drivers' or operators' licenses for motor vehicles, issuance, suspension revocation, and reinstatement of, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 100 to 160

Electricians, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 33 to 35

Engineers, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 36 to 38

Explosives, regulation and control of, see Am. Jur. 2d, Explosions and Explosives §§ 9 to 17

Federal Tort Claims Act, grant or denial of license or permit as within "discretionary function" exception to liability under, see Am. Jur. 2d, Federal Tort Claims Act § 46

Firearms, registration and licensing of, see Am. Jur. 2d, Weapons and Firearms §§ 32, 33; licensing of importers, manufacturers, or dealers in, see Am. Jur. 2d, Weapons and Firearms § 34

Fishing, regulation of, see Am. Jur. 2d, Fish, Game, and Wildlife Conservation §§ 35 to 63

Franchise contracts between private parties, see Am. Jur. 2d, Private Franchise Contracts §§ 1 et seq.

Franchises granted by government to private persons, see Am. Jur. 2d, Franchises From Public Entities §§ 1 et seq.

Funeral directors and embalmers, licensing of, see Am. Jur. 2d, Funeral Directors and Embalmers §§ 6 to 15

Gambling, licensing of, see Am. Jur. 2d, Gambling §§ 12 to 14; imposition of license or tax as legalization of, see Am. Jur. 2d, Gambling § 18

Hospitals, licensing of and certificates of need for, see Am. Jur. 2d, Hospitals and Asylums §§ 5, 6

Hunting, regulation of, see Am. Jur. 2d, Fish, Game, and Wildlife Conservation §§ 35 to 63

Insurance companies, agents, or brokers, licensing of, see Am. Jur. 2d, Insurance §§ 32, 44, 46, 57

Intoxicating liquors, licenses, permits, and taxes respecting, see Am. Jur. 2d, Intoxicating Liquors §§ 87 to 187

Landscape architects, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 62

Laundries or dry-cleaning businesses, licensing of, see Am. Jur. 2d, Laundries, Dyers, and Drycleaners §§ 6 to 8

Marriage licenses, see Am. Jur. 2d, Marriage §§ 30 to 32

Massage parlors and massagers, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 39 to 44

Medical practitioners, licensing of, see Am. Jur. 2d, Physicians, Surgeons, and Other Healers §§ 17 to 113

Moneylenders, excessiveness of license fees imposed upon, see Am. Jur. 2d, Moneylenders and Pawnbrokers § 14

Motor vehicles, licensing and registration of, see Am. Jur. 2d, Automobiles and Highway Traffic §§ 57 to 99

National Pollutant Discharge Elimination System (NPDES), permits issued in accordance with, see Am. Jur. 2d, Pollution Control §§ 736 to 790

Nuclear power facilities and handlers, licensing of, see Am. Jur. 2d, Energy and Power Sources §§ 69 to 90

Ocean Dumping Act, permits issued under, see Am. Jur. 2d, Pollution Control §§ 902 to 919

Outer Continental Shelf (OCS) air pollution sources, permits to operate, see Am. Jur. 2d, Pollution Control §§ 452 to 455

Outfitters and professional guides, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 61

Pardon as restoring license, or eligibility to hold license, to person pardoned, see Am. Jur. 2d, Pardon and Parole §§ 62, 63

Patented article, licensing of right to make, use, or sell, see Am. Jur. 2d, Patents §§ 1037 to 1084

Pawnbrokers, licensing of, see Am. Jur. 2d, Moneylenders and Pawnbrokers § 6

Peddlers and itinerant dealers, licensing of, see Am. Jur. 2d, Peddlers, Solicitors, and Transient Dealers §§ 64 to 83

Pesticide applicators, certification of under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), see Am. Jur. 2d, Pollution Control §§ 1691 to 1722

Pharmacists, licensing or registration of, see Am. Jur. 2d, Drugs and Controlled Substances § 89

Photographers, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 60

Plumbers, licensing and regulation of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 45 to 47

Private detectives and security agents, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 63

Radioactive waste and spent nuclear fuel, licenses connected with disposal and storage of, see Am. Jur. 2d, Pollution Control §§ 1486 to 1534, 1548 to 1558, 1562 to 1572

Real property, licenses in, see Am. Jur. 2d, Easements and Licenses in Real Property §§ 117 to 126

Resource Conservation and Recovery Act, permits for treatment, storage, or disposal of hazardous waste under, see Am. Jur. 2d, Pollution Control §§ 1074 to 1093

Secondhand and junk dealers, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 48 to 53

Shipboard personnel, licensing of, see Am. Jur. 2d, Shipping §§ 89 to 92

Surveyors, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 36 to 38

Tattooing, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 67

Telephone and telegraph companies, imposition of license fees upon, see Am. Jur. 2d, Telecommunications § 29

Television dealers and technicians, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 64

Tenant's obligation to pay rent as excused by refusal or failure of lessor or other entity to issue license or permit, or revocation of license or permit, see Am. Jur. 2d, Landlord and Tenant § 605

Theaters and public amusements, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 68

Trademark or tradename, licensing of, see Am. Jur. 2d, Trademarks and Tradenames § 18

Trading stamps and trading stamp schemes, license taxes upon, see Am. Jur. 2d, Occupations, Trades, and Professions §§ 88 to 90

Veterinarians, licensing of, see Am. Jur. 2d, Veterinarians §§ 3 to 5

Watchmaking and repair, licensing of, see Am. Jur. 2d, Occupations, Trades, and Professions § 66

Water power projects, licenses and preliminary permits for issued under Federal Power Act, see Am. Jur. 2d, Public Utilities §§ 199 to 202

Zoning laws, special permits issued under, see Am. Jur. 2d, Zoning and Planning §§ 857 to 914

Research References:

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West's A.L.R. Digest (ALRDIGEST)

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